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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT APPENDIX
Volume II

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF PLEADINGS

COMES NOW, Defendant A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., and pursuant to the stipulation entered into among the parties and approved by the Court, requests that the Court take judicial notice of the following evidence in consideration of the Plaintiffs' Application for injunction:

1. All of the pleadings, briefs, orders, petitions, and matters of record filed with the United States Bankruptcy Court for the Middle District of Alabama in the case of *In re: Parsons Steel Industries, Inc., a bankrupt corporation,* Docket No. 79-173.

2. The order of the Circuit Court of Montgomery County, Alabama in the case of *Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, et al.* joining the Trustee in Bankruptcy, A. Pope Gordon, as a Party Plaintiff, in the above-styled action. A copy of said Order is attached hereto as Exhibit "A".

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. Debray

Attorneys for A. Pope Gordon,
Trustee in Bankruptcy

EXHIBIT "A"

ORDER

The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood.

It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED.

DONE and ORDERED this the 12th day of December, 1979.

/s/ William R. Gordon
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF EVIDENCE

Comes now Defendants Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and pursuant to the stipulation entered into among the parties and approved by the Court request that the Court take judicial notice of the following evidence in consideration of the Plaintiffs' application for injunction:

1. The following matters from *Parsons Steel Inc., et al. v. First Alabama Bank of Montgomery,* Case Number 79-249-N, United States District Court for the Middle District of Alabama:

a. Defendant's motion to dismiss filed June 18, 1979;

b. Defendant's motion to dismiss or alternatively motion for summary judgment filed August 6, 1979;

c. Defendant's motion for partial summary judgment filed September 19, 1979;

d. Defendant's renewed motion for summary judgment filed January 29, 1979;

e. Defendant's motion for reconsideration of Court's order of 5/30/80 filed June 19, 1980;

f. Defendant's answer to complaint as amended and counterclaim filed June 26, 1980;

g. Order on pretrial hearing filed December 17, 1980;

h. Order amending the pretrial order filed December 24, 1980;

i. Defendant's motion for directed verdict filed March 17, 1981;

j. Defendant's motion for directed verdict filed March 19, 1981;

k. Defendant's motion to vacate and dismiss for absence of subject matter jurisdiction filed March 24, 1981;

2. The following matters *In Re: Parsons Steel Industries, Inc., A Bankrupt Corporation,* Docket Number 79-173, United States Bankruptcy Court for the Middle District of Alabama:

a. Order of April 5, 1979, adjudicating Parsons Steel Industries, Inc. a bankrupt;

b. Order of May 7, 1979 appointing Trustee;

c. Order on Trustee's application to employ an attorney dated June 19, 1979;

d. Order relieving Trustee's attorney and appointing another in his place dated July 27, 1979;

e. Petition for permission to pursue litigation filed November 27, 1979;

f. Order authorizing Trustee to pursue litigation dated December 5, 1979;

g. Complaint of Pope Gordon, as Trustee, against Parsons Steel Inc., Melba L. Parsons and Jim D. Parsons filed March 19, 1981.

BEASLEY AND WILSON

BY: /s/ Frank M. Wilson

Attorney for Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

AMENDMENT TO ANSWER OF DEFENDANT PARSONS STEEL INC., JIM D. PARSONS AND MELBA L. PARSONS

Come now the Defendants Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and amend their answer heretofore filed by adding the following:

TENTH DEFENSE

Plaintiffs are estopped from seeking the relief sought in their complaint due to their having taken inconsistent positions heretofore, i.e., having argued at all stages of the Federal litigation that the court lacked jurisdiction of that claim.

ELEVENTH DEFENSE

Plaintiffs are barred from obtaining the relief sought in their complaint by the doctrine of the doctrine of Collateral Estoppel in that the issue of whether the state action is barred by principles of res judicata or collateral estoppel has been fully litigated in the state action and a final judgment rendered.

BEASLEY AND WILSON

BY: Frank M. Wilson

Attorneys for Parsons Steel, Inc.,
Jim D. Parsons and Melba L.
Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

AMENDMENT TO ANSWER OF A. POPE GORDON, TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF PARSONS STEEL INDUSTRIES, INC.

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., and hereby amends its Answer heretofore filed in the above-styled cause as follows:

FIRST DEFENSE

Plaintiffs are estopped from seeking the relief sought in their complaint due to their having taken inconsistent positions heretofore, i.e., having argued at all stages of the Federal litigation that the Court lacked jurisdiction of that claim.

SECOND DEFENSE

Plaintiffs are barred from obtaining the relief sought in their complaint by the doctrine of the doctrine of Collateral Estoppel in that the issue of whether the State action is barred by principles of *res judicata* or collateral estoppel has been fully litigated in the state action and a final judgment rendered.

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. DeBray

Attorneys for Trustee

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

SUPPLEMENTATION TO REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF EVIDENCE

Come now Defendants Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons and pursuant to the stipulation entered into among the parties and approved by the Court supplements its request that the court take judicial notice of evidence by attaching hereto a copy of the various pleadings and orders from the related cases.

BEASLEY AND WILSON

BY: FRANK M. WILSON
Attorneys for Defendants

FRANK M. WILSON
P.O. Box 4537
Montgomery, Alabama 36101

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION TO DISMISS

Comes defendant, First Alabama Bank of Montgomery, N.A., a national banking association (hereinafter "Bank"), and moves the Court to dismiss this action on the following grounds:

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that federal courts do not have subject matter jurisdiction of suits involving

national banks merely because such banks are federally chartered.

3. There is no jurisdiction of the subject matter in that this action is plainly not one within the scope and meaning of 12 U.S.C.A. §§ 1972 and 1975 — parts of the Bank Holding Company Amendments of 1970 which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

4. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in the antitrust laws.

5. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in 12 U.S.C.A. § 1972.

6. Defendant assigns the foregoing grounds on the basis that neither officers, nor stockholders, nor controlling stockholders nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

7. The complaint fails to state a claim upon which relief can be granted.

8. There is an entire absence of federal jurisdiction over this attempted action.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT

Comes defendant, First Alabama Bank of Montgomery, N.A., a national banking association (hereinafter "Bank"), and moves the Court to dismiss this action on the following grounds:

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that federal courts do not have subject matter jurisdiction of suits involving national banks merely because such banks are federally chartered.

3. There is no jurisdiction of the subject matter in that this action is plainly not one within the scope and meaning of 12 U.S.C.A. §§ 1972 and 1975 — parts of the Bank Holding Company Amendments of 1970 which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

4. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in the antitrust laws.

5. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in 12 U.S.C.A. § 1972.

6. Defendant assigns the foregoing grounds on the basis that neither officers, nor stockholders, nor controlling stockholders nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

7. The complaint fails to state a claim upon which relief can be granted.

8. In support of this motion, defendant attaches hereto as a part hereof the affidavit of Edward Herbert and all exhibits thereof.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, First Alabama Bank of Montgomery, N.A., hereinafter Bank, upon the basis of this Court's Order of August 24, 1979; of Bank's Motion for Summary Judgment of August 6, 1979 (and attached exhibits); the response of Plaintiffs (and attached exhibits); and of all of the pleadings on file, moves for a Partial Summary Judgment specifying that the only material issue of fact for trial is

> "whether the Defendant required the Plaintiffs to allow a customer of the Defendant to control Parsons Steel in connection with the making of loans to Parsons Steel"

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant, First Alabama Bank of Montgomery, N.A. (hereafter "Bank") moves the Court as follows:

To enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in Bank's favor dismissing the entire action with prejudice, on the ground that there is no genuine issue as to any material fact and that Bank is entitled to judgment as a matter of law.

This motion is based upon:

1. The pleadings on file in this case.

2. Plaintiffs' interrogatories to Bank and Bank's answers thereto.

3. The affidavit of Edward Herbert of August 3, 1979.

4. The deposition of Edward Herbert of October 8, 1979.

5. Plaintiffs' requests for admission and Bank's responses thereto.

6. The depositions of E. W. Hodge, Joseph M. Cherry, June Neely and Jim D. Parsons of October 9, 1979; James S. Gaskell, Jr., Thomas Peacock, Sam Kaufman, Paul Norris, William Epperson, J. Allen Reynolds, William B. Jordan of January 21, 1980; Michael Orange of January 22, 1980; and William Richardson, Luther Waller, Charles Brightwell and George Goodwyn of January 28, 1980.

7. This Court's order of August 24, 1979.

8. Such further supplemental materials as Bank may desire, in which event Bank will furnish plaintiffs with copies thereof prior to the hearing of this motion.

WHEREFORE, defendant moves to this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor on the ground that the foregoing specified pleadings, depositions, affidavit, interrogatories and answers thereto, requests for admission and responses thereto and this Court's order of August 24, 1979 show that there is no genuine issue as to any material fact, and that Bank is entitled to judgment as a matter of law.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S ALTERNATIVE MOTION FOR DISMISSAL OR FOR SUMMARY JUDGMENT

Defendant respectfully moves that this Court reconsider its order of May 30, 1980 in the above entitled action which denied defendant's alternative motion for dismissal or summary judgment (hereinafter "Defendant's Motion). As grounds defendant assigns the following:

1. Foremost among the grounds assigned in its alternative motion for dismissal of this action was an absence of subject matter jurisdiction, asserted under Rule 12(b) (1), F.R.C.P. Defendant's Motion, asserting such an absence of subject matter jurisdiction, was based upon the extensive factual materials specified in the motion. Plaintiffs, upon whom rests the burden of proving the existence of subject matter jurisdiction asserted under the Bank Holding Company Act Amendments, 12 U.S.C.A. §§ 197' 1978, submitted other materials.

2. This Court, in denying Defendant's Motion, applied an impermissible test, namely, the question of whether a genuine issue of fact existed; specifically declined to decide the factual issues relating to its subject matter jurisdiction; incorrectly held that inferences were to be indulged in favor of plaintiff, when, indeed, the burden of proof of subject matter jurisdiction was and is upon plaintiffs; and impermissibly made no decision, and expressed no opinion, "on the probative value or weight to be given any of the evidence submitted by either party at this stage of this proceeding." (n. 2, p. 9) In so doing, this Court impermissibly departed from a "first principle of federal jurisdiction" that "[i]t is is incumbent on a court of the United States, whether trial or appellate, to dismiss an action whenever it appears that subject matter jurisdiction is lacking, and the

court must do so sua sponte if the parties have not brought the issue to the attention of the court." *Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 671-672 (5th Cir. 1979).

3. Thus, this court impermissibly departed from the well established principle that a challenge to subject matter jurisdiction shifts the burden to a plaintiff to prove that jurisdiction exists; that the submission of matters outside the pleadings on the question of subject matter jurisdiction does not convert a 12 (b) (1) question to a Rule 56 question of simply whether a genuine issue of fact exists; and from the principle that, on the contrary, it is incumbent upon a district court to determine whether it has jurisdiction, and in the process to resolve questions of fact, in recognition of the further principle that proof of jurisdiction is on the plaintiff. *Gilbert v. David,* 235 U.S. 561, 566-568 (1915); *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1076 (5th Cir. 1978); and *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972).

In the words of the Supreme Court, *Thomson v. Gaskill,* 315 U.S. 442, 446:

> "[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. (Cit.) the bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount."

Accordingly, it is respectfully requested that this Court reconsider and withdraw its order of May 30, 1980; that is resolve the factual issues relating to the subject matter jurisdiction of this Court; and that it conclude that there is no subject matter jurisdiction because of patent inapplicability of the federal statute upon which jurisdiction is asserted, 12 U.S.C.A. §§ 1971-1978; and that it dismiss this action for want of subject matter jurisdiction.

Respectfully submitted,

STEINER, CRUM & BAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ANSWER AND COUNTERCLAIM

Comes defendant, First Alabama Bank of Montgomery, N.A., and answers the Complaint as Amended ("the Complaint") as follows:

First Defense

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that this action is not one within the scope and meaning of 12 USCA §§ 1972 and 1975 — parts of the Bank Holding Company Act Amendments of 1970 ("BHCA"), which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant aspects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

3. Plaintiffs have no standing to bring this action and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden by the BHCA or by the antitrust laws.

4. The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Defendant admits the allegations of paragraphs 2 and 5 of the Complaint.

2. Defendant denies each and every allegation of paragraphs 1, 9, 10, 13, 14, 15, 16, 20, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39 and 40 (and all of its subparagraphs) of the Complaint.

3. In answer to paragraph 3 of the Complaint, sentence 1 is admitted; the allegations of sentence 2 are denied; defendant does not have sufficient knowledge or information to form a belief as to the truth of the allegations of sentence 3.

4. In answer to paragraphs 4, 6, 11 and 22 of the Complaint defendant does not have sufficient knowledge or information to form a belief as to the truth of these paragraphs.

5. In answer to paragraph 7 of the Complaint sentence 1 is admitted, and each allegation of sentence 2 is denied.

6. In answer to paragraph 8 of the Complaint defendant admits it made certain loans to Parsons Steel Industries, Inc. (hereafter "Subsidiary") during and prior to 1978, and that Parsons Steel, Inc., (hereafter "Parent") was required to sign a guaranty agreement up to $200,000. All other allegations of this paragraph are denied.

7. In answer to paragraph 12 of the Complaint, the 1st, 2nd and 5th sentences are admitted, except that the last such loan was made on October 26, 1978. All other allegations of prargraph 12 are denied.

8. In answer to paragraphs 17 and 18 of the Complaint, defendant admits that a letter was sent to creditors by attorney Kaufman, dated December 21, 1978 (copies of which are parts of numerous affidavits and depositions already on file), the content and meaning of which are contained in that letter. All other allegations of these paragraphs are denied.

9. Defendant denies each and every allegation of paragraph 19 of the Complaint, except that defendant admits that "a relatively small number of the creditors of Subsidiary" accepted the proposal contained in the Kaufman letter.

10. In answer to paragraph 21 of the Complaint, defendant denies all of the allegations of this paragraph. For further answer defendant appends as Exhibit A its notification of foreclosure of January 8, 1979.

11. In answer to paragraphs 23 and 24 of the Complaint, defendant attaches as Exhibits B, C and D documents which accurately describe the circumstances of foreclosure and sale, and the waiver and consent entered thereon. Defendant denies all other allegations of these paragraphs.

12. In answer to paragraph 26 of the Complaint, defendant admits that the relationship between Herbert and defendant was that of agent and principal. Defendant denies all other allegations of paragraph 26.

13. In answer to paragraph 36 of the Complaint, defendant admits that on January 12, 1979, defendant loaned the sum shown in the note attached as Exhibit E on the security shown therein. Defendant denies all other allegations of paragraph 36.

14. Defendant denies that plaintiffs are entitled to the relief sought.

Third Defense

Plaintiffs are estopped to bring this action, in that prior to the commencement of this lawsuit, plaintiffs took positions, upon which defendant relied, directly contrary to the positions they are asserting in this action. Specifically, but without limiting the generality of this defense, plaintiffs took the position that Michael Orange was acceptable as manager of Subsidiary; that they were in agreement with the attempted creditor composition represented by the Kaufman letter of December 21, 1978; that they had no objection to defendant's foreclosure on collateral securing Subsidiary's notes with defendant, and the sale of that collateral to OSI, Inc. at the price for which it was sold; and that they voluntarily sold the Montgomery real estate of Parent and Subsidiary to OSI, Inc.

Fourth Defense

Plaintiffs are barred from bringing this action in that they consented to each act by defendant of which they complain. Specifically, but without limiting the generality of this defense,

plaintiffs voluntarily entered into an option agreement with Michael Orange in which management of Subsidiary was turned over to Orange and Orange was given an option to purchase stock of Subsidiary; plaintiffs consented to the terms of the proposed creditor composition; they consented to foreclosure by Bank on the collateral securing Subsidiary's notes with Bank; they waived delay of sale of that collateral; they consented to sale of that collateral to OSI, Inc. and to the sales price; and consented to sale of the Montgomery real estate of Parent and Subsidiary to OSI, Inc. and to the sales price.

Fifth Defense

Plaintiffs fraudulently induced Bank to lend moneys to Subsidiary based upon false financial statements made on their behalf by plaintiff Jim D. Parsons (hereafter "Parsons"), as is set out in further detail in defendants Second Counterclaim below.

COUNTERCLAIM OF DEFENDANT

COMES NOW defendant and files and asserts the following Counterclaim against plaintiffs. Defendant files this Counterclaim without waiving any of the separate and several defenses heretofore asserted, including, without limitation, the defense that this Court has no jurisdiction of the subject matter of the action brought by plaintiffs.

First Counterclaim

1. Subsidiary executed the following three notes in favor of Bank: Note of June 7, 1977 in the amount of $500,000; Note of July 31, 1978 in the amount of $239,399; and Note of October 26, 1978 in the amount of $550,000. (hereafter, "the notes") These notes are attached hereto as Exhibits F, G and H, respectively. The note of June 7, 1977 was personally guaranteed by plaintiffs Parsons and Melba Parsons, and the notes of July 31 and October 26, 1978 were personally guaranteed by Parsons. All of Subsidiary's obligations with the Bank were guaranteed by Parent up to an amount of $200,000.

2. As of January 8, 1979 the amount past due and unpaid on the notes was approximately $1,000,000. In order to recover from plaintiff and Subsidiary the sum of money to which it was entitled, it was necessary for defendant to foreclose on the collateral which secured the notes; and it did so on January 15, 1979 and sold the collateral in satisfaction of the amount due and unpaid on the notes, with the exception of attorneys fees, on January 17, 1979.

3. The notes each contain the following provision:

> "In the event of default by Debtor . . . the proceeds of default sale realized from disposition of collateral may be applied to . . . Secured Party's reasonable attorney's fees of 15% of the unpaid debt, where the original principal amount or the original amount financed exceeds $300, and legal expenses associated with such sale, or any suit arising therefrom, or any suit brought to secure recovery of the collateral . . . Debtor shall be liable to Secured Party for any deficiency that may arise from sale or disposition of collateral."

4. Plaintiff and Subsidiary have brought two lawsuits which arise out of the circumstances of foreclosure specified in paragraph 2 of this Counterclaim — this action and an action brought in the Circuit Court of Montgomery County, Alabama, styled Parsons Steel Industries, Inc., et al. vs. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-G (hereafter "state action"). Both actions seek to undo and nullify the payment to defendant of the sums due and unpaid on the notes in the circumstances described in paragraph 2 of this Counterclaim. The state action seeks as well a recovery back of the collateral sold by defendant.

5. Any recovery by plaintiffs or Subsidiary in either action specified in paragraph 4 of this Counterclaim would create a deficiency which would be due and payable to defendant on the notes; and this Counterclaim asserts a right of recovery against plaintiffs in an amount of any such deficiency.

6. This Counterclaim seeks as well attorneys fees in connection with the default in payment of the notes — legal expenses stipulated in the notes to be "reasonable" legal expenses associated with the sale of collateral, "or any suit arising therefrom, or any suit brought to secure recovery of the collateral" — in an amount not less than $150,000, and other legal costs and expenses.

WHEREFORE, defendant demands judgment against plaintiffs for any deficiency in the amount of its recovery on the notes arising out of the circumstances specified in paragraph 4 hereinabove; judgment for its attorneys fees and legal costs and expenses arising out of or related to this action, the state action, or the foreclosure and sale of the collateral specified hereinabove; and related costs and interest in an amount not less than $150,000 plus costs and interest; and defendant demands such other, further or additional sum, judgment or relief to which it may be entitled.

Second Counterclaim

1. In connection with and for the purpose of influencing action in the form of obtaining a loan or loans from defendant (a national banking association the deposits of which at all relevant times were and are insured by the Federal Deposit Insurance Corporation) for himself and for Subsidiary, Parsons, acting on behalf of himself and the other plaintiffs, knowingly made the following false statements or reports, or willfully overvalued land, property or security, or both:

(a) Statement or reports attached hereto as Exhibits I, J and K recite that Parsons owned nonmarketable securities in the form of 99 shares of Parsons Steel, Inc. ("Parent") of the stated valuation of $163,900, $160,000 and $913,000 respectively, whereas, as shown in his deposition testimony of February 18, 1980 (attached hereto as Exhibit L) Parsons knew these statements to be false, and willfully made such false statements regarding this stock ownership. In fact, at the time such false

statements were knowingly made, Parsons owned only 1 share of such stock.

(b) On December 14, 1978 Parsons executed an option agreement with Michael Orange (attached hereto as Exhibit M) in which Parsons knowingly made the false statement or report that he was the owner of 98% of the stock of Parsons Steel, Inc. ("Parent"), whereas, as shown in his said deposition testimony (Exhibit L), Parsons knew this statement to be false and willfully made such false statement regarding this stock ownership. In fact, at the time such false statement was knowingly made, Parsons owned only 1% of such stock.

(c) Parsons willfully made the false statements or reports or willfully overvalued the land, property or security contained in the financial statements attached hereto as Exhibits N and O.

2. At all times material to this Counterclaim, Parsons' said actions or omissions including, without limitation, knowing false statements or willful overvaluation of land, property or security for the purposes of influencing actions in the form of loans from defendant to Subsidiary, were made and taken on his own behalf as well as on behalf of Subsidiary and the other plaintiffs.

Each of these wrongful acts or omissions specified in this Counterclaim constituted knowing or willful violations of 18 USCA § 1014, a federal criminal statute. As such this misconduct, proscribed by this federal criminal statute, constitutes actionable common law fraud which entitles defendant to recovery for injury and damages proximately caused by such fraud, and to punitive damages as well. Included, without limitation, among the injuries and damages proximately caused by such fraudulent misconduct on the part of plaintiffs are all financial losses on loans to Subsidiary and Parsons; the costs of defense of this action and the state action, and the amount of any damages assessed and the financial impact of any relief ob-

tained in these two actions; and all of the damages sought in the First Counterclaim.

WHEREFORE, defendant demands judgment against plaintiffs for compensatory damages as aforesaid, together with interest and costs of this action, and punitive damages. Defendant also demands such other, further or additional sums, judgment or relief to which it may be entitled.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

P.O. Box 668
Montgomery, Alabama 36101

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ORDER ON PRETRIAL HEARING

This cause coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed:

(a) Complaint;

(b) Amendment to Complaint;

(c) Answer to Complaint as Amended of Defendant;

(d) Counterclaim of Defendant; and

(e) Answer of Plaintiff to Counterclaim.

2. Parties plaintiff:

(a) Parsons Steel, Inc., is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

(b) Jim D. Parsons and Melba L. Parsons are resident citizens of Mobile County, Alabama.

3. Party defendant:

First Alabama Bank of Montgomery, N.A. (hereafter "Bank"), is a national banking association organized and existing under the laws of the United States, having its principal place of business in Montgomery, Alabama.

4. Jurisdiction: Plaintiffs contend that jurisdiction is conferred on this Court by 12 U.S.C.A .§ 1971, et seq., the Bank Holding Company Act Amendments of 1970 ("BHCA").

Defendant has asserted through repeated motions to dismiss and for summary judgment that no subject matter jurisdiction exists.

5. Statement of Plaintiffs Case:

6. Statement of Defendant's Case:

(a) *Defenses.* In addition to the general denial, defendant asserts the following defenses:

(1) No Federal Jurisdiction. There is no federal subject matter jurisdiction in that this action is plainly not within the scope and meaning of the BHCA, which forbids tie-ins and tying arrangements in specified circumstances. There was no extension of credit within the meaning of BHCA. Plaintiffs put forward a proposal for a general creditor composition under the terms of which Subsidiary's loans with Bank would be restructured to permit delayed repayment of principal at reduced interest rates, and under which plaintiffs would agree to a change in management of Subsidiary. Bank's only agreement was that it would accept such a proposal if the proposal was also accepted by other creditors. Such an agreement does not consititute an extension of credit within the meaning of the BHCA.

Even assuming arguendo that there had been an extension of credit, the condition for restructuring — a change in management — was not an additional property or service to Bank other than that "usually provided in connection with a loan", within the meaning of the BHCA.

An additonal jurisdictional deficiency is the lack of actual damages. Under the BHCA, by analogy to related antitrust statutes, proof of actual damages is an element of the cause of action. There have been no such damages.

(2) Standing. Plaintiff have no standing to bring this action and are improper parties plaintiff to it since they have suffered no injury to their business or property by reason

of anything forbidden by the BHCA or by related antitrust laws.

(3) Estoppel. Plaintiffs are estopped to bring this action, in that prior to the commencement of this lawsuit plaintiffs took positions, upon which defendant relied, directly contrary to the positions they are asserting in this action.

(4) Consent. Plaintiffs are barred from bringing this action in that they consented to each act by defendant of which they complain.

(5) Fraud. Plaintiffs fraudulently induced Bank to lend monies to Subsidiary based upon false financial statements made on their behalf by plaintiff Jim D. Parsons.

(b) *Counterclaims.*

(1) First counterclaim. Subsidiary executed three notes to Bank in a total amount of $1,289,399. These notes were guaranteed in whole or in part by plaintiffs. Upon default Bank foreclosed on the collateral securing these notes and sold the collateral in satisfaction of the amount due and unpaid, with the exception of attorneys expenses. Each of these notes contains a provision permitting an offset against the recovery from the sale of collateral for an attorney's fee of fifteen (15%) percent of the unpaid debt, plus legal expenses associated with any suit arising from such sale. Plaintiffs and subsidiary have brought two lawsuits arising out of the circumstances of foreclosure — this action and an action brought in the Circuit Court of Montgomery County, Alabama. Both actions seek to undo the foreclosure sale, and seek compensatory and punitive damages. To the extent that these suits are successful they would create a deficiency on Subsidiary's notes which defendant would be entitled to recover from plaintiffs as guarantors.

In this counterclaim defendant seeks to recover for attorney's expenses in an amount not less than 15 percent of the unpaid balance and expenses to date arising out of the foreclosure sale and subsequent lawsuits in the amount of $28,639.50. This amount will be subject to increase as the two lawsuits continue. In addition, of the total amount of the unpaid debt of subsidiary assumed after foreclosure by Orange Steel Industries, Inc. — $1,300,000 — Bank has been required by the comptroller of the currency to charge off as an asset, but nevertheless a debt subject to collection, the amount of $624,750.00 which creates a deficiency of subsidiary's notes with Bank.

(2) Second Counterclaim. Bank extended loans to subsidiary in reliance upon representations made to Bank by subsidiary and Jim Parsons that Parsons owned 99 percent of the stock in Plaintiff, Parsons Steel, Inc., and on reports stating the financial condition of subsidiary. These representations were false and known to be false in that Plaintiff, Jim Parsons, did not in fact own 99 shares of Parsons Steel, Inc., and in that the value of the land, property and securities contained in financial statements of subsidiary was willfully over-valued. In reliance on these false representations, the Bank extended loans to the subsidiary which were subsequently defaulted upon and which default resulted in the injuries and damages set out in defendant's second counterclaim.

7. It is ORDERED by this Court that:

(a) All discovery on questions of liability, except "Standing" as discussed herein in Paragraph 6(a) (2), shall be completed on or before March 2, 1981.

(b) Issues of liability of defendant other than "Standing" will be tried separate from issues of damages and liability on the counterclaim before the same jury.

(c) The parties shall, no later than February 16, 1981, exchange lists stating the names and addresses of all witnesses whom they expect to offer at trial and summaries of the expected testimony of any expert witness. Such lists shall also identify any depositions that a party expects to use. Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be precluded from calling a witness not so listed. Except to the extent written notice to the contrary is given prior to the date of the trial, each party shall be deemed to have agreed that the conditions of Rule 32 (a) (3), Federal Rules of Civil Procedure, are satisfied with respect to the deposition of any person identified in the list as one whose testimony is expected to be offered by deposition.

(d) The parties shall, on or before February 16, 1981, exchange lists describing all exhibits which they may utilize at trial. Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be precluded from offering in evidence any exhibit not so identified. Each party shall make such exhibits available for inspection and copying. Except to the extent written notice to the contrary is given by March 2, 1981, the evidence shall be deemed admissible.

8. If is further ORDERED by this Court that all of the above-named allowances and agreements be, and the same are hereby, binding upon all parties in the above-styled cause unless this Order be hereafter modified by order of the Court.

DONE this 17th day of December, 1980.

R. E. Varner

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ORDER

It is ORDERED by this Court that the Pretrial Order filed herein December 17, 1980, be, and the same is hereby, amended by adding the following to Paragraph 5, on Page 2, of said Order:

"5. Statement of Plaintiffs' Case: A. The Plaintiffs contend that the Defendant, a national banking association, violated Title 12, U.S.C. § 1972, by placing certain requirements on Plaintiffs — the Defendant's customers — as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc. These conditions were not of such nature as to be usually provided to a bank by a customer in connection with a loan. The specific conditions placed on Plaintiffs consisted of requiring (1) a change in the management of Parsons Steel Industries, Inc., and (2) the sale or agreement to sell a majority of the capital stock of said corporation to Michael Orange, a third party secured by the Defendant and unknown to the Plaintiffs. Defendant gave Plaintiffs no choice but to accept these conditons or face the certainty of no additional loans to Parsons Steel Industries, Inc. Plaintiffs were at the time customers of Defendant for the purposes of 12 U.S.C. §§ 1971, *et seq.*, and specifically §§ 1972 and 1975.

B. Plaintiffs contend that, as a result of the Defendant's violation of 12 U.S.C. § 1972, they were injured and damaged in their business and property and are, therefore, entitled to recover three times the amount of their damage, pursuant to 12 U.S.C. § 1975 and the cost of this action, including a reasonable attorney's fee.

C. Plaintiffs claim as their damages (1) injury to their general reputation in the business community; (2) a loss of earnings by Parsons Steel, Inc.; (3) a loss by Parsons Steel, Inc., of the value of its stock in Parsons Steel Industries, Inc.; (4) a loss of real estate by Parsons Steel, Inc., valued at $1,003,000.00; (5) the loss of his job by Jim D. Parsons resulting in a loss of income; (6) Melba L. Parsons' stock was impaired and greatly decreased in value; (7) each individual Plaintiff was caused to suffer great worry, stress and mental anguish; (8) their costs of this action; and (9) a reasonable attorney's fee.

D. Plaintiffs' contentions as to Defendant's Counterclaims: 1. *First Counterclaim:* The Plaintiffs deny that they are indebted to the Defendant and deny that the provision quoted in ¶ 3 of the First Counterclaim applies to the circumstances of this litigation or that the Defendant is entitled by reason thereof to recover any amount against the Plaintiffs. Plaintiffs contend that there is no deficiency balance on any loan from the Defendant. The Plaintiffs specifically contend that the Defendant is limited to recovering, if anything, its actual payments for attorneys' fees arising out of the foreclosure.

2. *Second Counterclaim:* Plaintiffs contend that this counterclaim is barred by the statute of limitations. Plaintiffs further deny the material allegations of the Second Counterclaim and deny that they are indebted to the Defendant in any amount. Plaintiffs further contend that the Defendant has suffered no damage as the result of any action alleged in its Second Counterclaim. The Plaintiffs further contend that any of the damages claimed by the Defendant were proximately caused, not by any actions of Plaintiffs, but by the Defendant's violation of federal and State law as alleged in Plaintiffs' complaint. Plaintiffs deny that they are liable to Defendant in any amount for any of the matters alleged in the Second Counterclaim. Plaintiffs contend that the Defendant's prior actions estop it from recovery under the Second Counterclaim."

Apparent factual statements hereinabove are the Plaintiffs' contentions.

DONE this 24th day of December, 1980.

R. E. Varner

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION FOR DIRECTED VERDICT

Defendant, pursuant to Rule 50 F.R.C.P., moves that the Court direct a verdict in its favor and specifies as grounds therefor the following:

1. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of those parts of the Bank Holding Amendments of 1970, 12 U.S.C.A. §§ 1972, et seq., upon which the complaint in this action is based (hereafter "BHCA").

2. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do forbid tie-ins and tying arrangements in circumstances and in all respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

3. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.

4. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were not intended to and do not interfere with the conduct of appropriate traditional bank practices.

5. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of

BHCA which were intended to and do guard against unfair competition and misuse of economic power of the kind also made impermissible under the federal antitrust laws.

6. The evidence is insufficient to warrant a finding that plaintiffs, or any of them, have shown by substantial evidence any injury to their business or property by reason of anything forbidden in BHCA.

7. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of BHCA and, on the contrary, there is no substantial evidence to show that any act or omission of bank was anything other than a permissible attempt, in accordance with appropriate, traditional and sound banking practices, to protect its investments.

8. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA.

9. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA. On the contrary, the evidence is insufficient to show that defendant ever contemplated a loan to any subsidiary of plaintiff, Parsons Steel, Inc.; and the evidence is insufficient to warrant a finding that any loan negotiations ever reached the point of even an oral agreement concerning any phase of a formal loan agreement.

10. The evidence does not warrant a finding that defendant ever imposed, or sought to impose, any condition for the making of a loan or extension of credit which was prohibited, as a tying arrangement, by BHCA.

11. The evidence is insufficient to warrant a finding that any act or omission of defendant complained of in this case conferred any economic benefit or competitive advantage on defendant as it must for there to be a violation of BHCA.

12. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA.

13. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA, since stockholders cannot maintain an action under BHCA to redress an alleged injury to a corporation in which they own stock or which is a subsidiary of a corporation in which they own stock.

14. The evidence is insufficient to warrant a finding that defendant's acts or omissions were the types of tying arrangements prohibited and made impermissible by BHCA, or that defendant's acts or omissions were inappropriate, nontraditional (and thus impermissible) banking practices.

15. The evidence compels a finding that plaintiffs bear equal responsibility for the creation of and their participation in the acts, omissions or plans which they now contend violate BHCA, and that plaintiffs were full, willing and knowledgeable participants in such plans, acts or omissions.

The foregoing specified grounds, separately and severally, entitle defendant to a directed verdict in accordance with the teachings and principles set down in *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1382-85 (5th Cir. 1979).

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

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3. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.

4. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were not intended to and do not interfere with the conduct of appropriate traditional bank practices.

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BHCA which were intended to and do guard against unfair competition and misuse of economic power of the kind also made impermissible under the federal antitrust laws.

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13. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA, since stockholders cannot maintain an action under BHCA to redress an alleged injury to a corporation in which they own stock or which is a subsidiary of a corporation in which they own stock.

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STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION OF DEFENDANT TO VACATE AND DISMISS FOR ABSENCE OF SUBJECT MATTER JURISDICTION

Defendant moves the Court to vacate the jury verdict of March 19, 1981; to abstain from entering any judgment thereon; and to dismiss this action, all for the reason, as repeatedly asserted by defendant throughout the course of this litigation, that there is no jurisdiction of the subject matter.

It is axiomatic that a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings;[1] and entry of a judgment would be a wrongful extension of federal jurisdiction, conferring upon district courts power the Congress has denied them.[2]

Plaintiffs seek to base federal jurisdiction *solely* on the Bank Holding Company Act Amendments of 1970, 12 U.S.C.A. §§ 1971-78 (hereafter, "BHCA"). The facts have been fully developed in trial. It now remains for this Court — and only this Court — to determine whether plaintiffs have sustained their burden of proving federal jurisdiction under that statute.

This Court is the sole trier of fact on the issue of subject matter jurisdiction. It must resolve all factual issues crucial to a determination of its subject matter jurisdiction; and presumptions are *not* with plaintiffs, who have the burden of proof of

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[1] *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

[2] *American Fire and Cas. Co. v. Finn*, 341 U.S. 6, 17-18; *Marshall v. Gibson's Products of Plano*, 584 F.2d 668 (5th Cir. 1978).

federal jurisdiction. Federal courts have an obligation, even on their own motion, if necessary, to dismiss an action whenever it becomes apparent that there is an absence of federal subject matter jurisdiction. *American Fire & Cas. Co. v. Finn,* 341 U.S. 6, 17-18; *Marshall v. Gibson's Products of Plano,* 584 F.2d 668 (5th Cir. 1978). This deficiency may be raised at any time. Rule 12(h) (3), F.R.C.P.

When subject matter jurisdiction is challenged, the burden shifts to the plaintiff to prove that jurisdiction exists. *Thompson v. Gaskill,* 315 U.S. 442, 446; *Menchaca v. Chrysler Credit Corp., supra.,* at 512; *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.,* 469 F.2d 416, 418 (5th Cir. 1972); *Save Our Cemeteries, Inc. v. Archdioses of New Orleans, Inc.,* 568 F.2d 1074, 1076 (5th Cir. 1978).

The Court, and not a jury, must weigh and decide any factual issue involved in a challenge to federal subject matter jurisdiction. *Gilbert v. David,* 235 U.S. 561, 566-68. *See* 5 Wright & Miller, *Federal Practice & Procedure,* § 1350 p. 556-58. The Fifth Circuit made this plain in Rosemound:

> "Rosemound urges that it was denied its Seventh Amendment right to a trial by jury because of the trial judge's decision on the jurisdictional question. The short answer is that there has been no denial of this right because questions of jurisdiction are properly within the ambit of the Court's authority."

The Court, in resolving disputed questions of fact in the course of determining whether plaintiffs have met their burden of proving subject matter jurisdiction, may and should resolve those questions for itself — and decide in the process what weight and credibility to give to the testimony of any party or witness. *Gilbert v. David,* 235 U.S. 561, 566-68; *Wetmore v. Rymer,* 169 U.S. 115, 120-21; *Land v. Dollar,* 330 U.S. 731, 735-6, n. 4; *Menchaca v. Chrysler Credit Corp., supra.*;

Williamson v. Tucker, 632 F.2d 579, 588 (5th Cir. 1980);[3] and *Mortensen v. First Federal S & L,* 549 F.2d 884, 891-892 (3rd Cir. 1977).

Finally, it is respectfully submitted that this Court should now decide for itself on the basis of all of the evidence whether it has subject matter jurisdiction under BHCA, that is to say whether there was an extension of credit within the meaning of that act; and whether, even if there was, any act or omission of defendant constituted a prohibited tying arrangement within its meaning.[4]

Accordingly, defendant moves that this Court vacate the jury verdict of March 19, 1981; abstain from entering judgment thereon; and dismiss this action — all because of absence of federal subject matter jurisdiction.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

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[3] "Jurisdictional issues are for the court — not a jury — to decide, whether they hinge on legal or factual determinations. (Cit.) The unique power of district courts to make factual findings which are decisive of jurisdiction is, therefore, not disputed."

[4] Obviously defendant does not abandon its earlier arguments that plaintiffs have no standing to sue — also a matter of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

In re
Parsons Steel Industries, Inc.

Bankruptcy No. 79-173-N

ADJUDICATION

On consideration of the petition filed on March 5, 1979, it is adjudged that Parsons Steel Industries, Inc. is a bankrupt.

Dated: April 5, 1979

Rodney R. Steele

Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

In re
Parsons Steel Industries, Inc.
Route 6, Box 43
Montgomery, Alabama 36108

Bankruptcy No. 79-173-N

ORDER APPROVING ELECTION OF TRUSTEE OR APPOINTING TRUSTEE AND FIXING THE AMOUNT OF HIS BOND

(1) A. Pope Gordon of P.O. Box 4414, Montgomery, Alabama 36101, is hereby approved as the elected [*or* is hereby appointed] trustee of the estate of the above-named bankrupt.

(2) The amount of the bond of the trustee is fixed at $40,000.00

Dated: May 7, 1979

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

ORDER ON TRUSTEE'S APPLICATION TO EMPLOY AN ATTORNEY

The Trustee in this case filed an application on June 4, 1979, seeking to have this Court appoint Jere L. Beasley as his attorney for the purpose of prosecuting a certain lawsuit against certain named persons, principally the First Alabama Bank of Montgomery, and Mr. Herbert, one of its officers, and against one Michael Orange and others relating to the alleged foreclosure and re-sale of certain property of this Bankrupt immediately prior to bankruptcy.

It now appears that Jere L. Beasley, by virtue of his representation of Parsons Steel, Incorporated, a Mobile corporation and Mr. Jim Parsons, individually, may have some conflict of interest, in the prosecution of the suit on behalf of Trustee as well as in the prosecution of a suit filed by Mr. Beasley on behalf of Parsons Steel and Jim D. Parsons, individually against the same or some of the same defendants.

The Court concludes that it would be in the best interest of this estate not to appoint Mr. Jere L. Beasley.

Trustee now seeks to have the Court to appoint in the stead of Mr. Beasley Honorable George B. Azar, attorney at law, Montgomery, and the Court concludes that Mr. Azar is eminently qualified to pursue the cause of action filed against the above named defendants and other causes of action which may arise in favor of this estate. No conflict appears in the appointment of Mr. Azar as attorney for the Trustee.

It is therefore ORDERED that upon the application of Trustee for authority to employ an attorney, the Trustee is hereby authorized to employ Honorable George B. Azar as attorney for the prosecution of suits against the First Alabama Bank of Montgomery, Mr. Herbert of that bank, Mr. Michael Orange, and other defendants, and upon the execution of the appropriate affidavit by Mr. Azar, this Order will be deemed to constitute an appointment of Mr. Azar as the attorney for Trustee.

Dated at Montgomery, Alabama this 19th day of June, 1979.

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

ORDER RELIEVING TRUSTEE'S ATTORNEY AND APPOINTING ANOTHER IN HIS PLACE

On July 26, 1979, the Honorable George B. Azar who was appointed as attorney for the Trustee in this case, on June 19, 1979, notified the Court that he had been made aware of a clear conflict involving his representation of the Trustee and the representation by his law firm through another member of that law firm of the First Alabama Bank of Montgomery, N.A., a party adversary to the Bankrupt, in proceedings now pending.

Mr. Azar seeks to be relieved of his duties as attorney for Trustee, and the Court concludes that his Motion is well taken.

It is therefore ORDERED that the Honorable George B. Azar is hereby relieved of his duties as attorney for the Trustee in this cause.

The Trustee on the same day filed an application for the appointment of Honorable James Jerry Wood, attorney at law, of Montgomery, Alabama, as his attorney for the prosecution of certain suits or causes of action against the First Alabama Bank of Montgomery, and others. No conflict or adverse interest appear in the appointment of Mr. Wood and the Court concludes that he ought to be appointed at Trustee's request to represent him.

It is therefore

ORDERED that the Honorable James Jerry Wood is hereby appointed as the attorney for the Trustee for the prosecution of certain causes of action including causes of action against the First Alabama Bank of Montgomery, N.A.

Dated at Montgomery, Alabama this 27th day of July, 1979.

Rodney R. Steele

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

PETITION

COMES NOW James Jerry Wood, the attorney for the Trustee, Pope Gordon, in the above-styled case, and petitions this Honorable Court for permission to pursue litigation pending in the Circuit Court of Montgomery County pursuant to 11 U.S.C. §541.

There is pending before the Honorable William Gordon Civil Action No. CV-79-179-G, Parsons Steel Industries, et al., Plaintiffs, vs. First Alabama Bank of Montgomery, N.A., et al., Defendants, a case which was instituted by the Bankrupt-Debtor prior to bankruptcy. The case involves the commercial reasonableness of the levy and foreclosure on assets of Parsons Steel Industries, Inc. by the First Alabama bank prior to bankruptcy. Further it concerns whether the First Alabama Bank of Montgomery improperly used "insider financial information" furnished by the debtor and whether the bank foreclosed on Parsons Steel Industries, Inc. assets and sold them for a value less than the fair market value of these assets.

DATED this 27th day of November, 1979.

James Jerry Wood

Attorney for Trustee

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA
No. 79-173-N
[Caption Omitted]

ORDER AUTHORIZING TRUSTEE TO PURSUE LITIGATION

On November 27, 1979, the attorney for the Trustee in this case filed a Petition for permission to pursue litigation pending in the Circuit Court of Montgomery County, Alabama, pursuant to the Bankruptcy Act.

The litigation which he intends to pursue is Civil Action No. CV-79-179-G, styled Parsons Steel Industries, et al., Plaintiffs, vs. First Alabama Bank of Montgomery, N.A., et al., Defendants.

The Court is satisfied that the cause of action above styled is an asset of this estate, which it is in the best interest of the creditors to pursue, and that the Trustee ought to be authorized to prosecute that cause of action.

It is therefore ORDERED that the Trustee be and he is hereby authorized, through his attorney, James Jerry Wood, to prosecute the above styled cause of action, and to make report at the appropriate time concerning the outcome of such civil action.

Dated at Montgomery, Alabama this 5th day of December, 1979.

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

COMPLAINT

TO THE HONORABLE RODNEY R. STEELE, BANKRUPTCY JUDGE:

The Plaintiff Pope Gordon, as trustee of the estate of Parsons Steel Industries, Inc., a corporation, a bankrupt, respectfully represents as follows:

(1) Plaintiff is Pope Gordon, the duly appointed Trustee in the estate of Parsons Steel Industries, Inc., a corporation, a bankrupt.

(2) Defendants are Parsons Steel, Inc., a corporation, Jimmy Douglas Parsons, an individual, Melba L. Parsons, an individual and Joe L. Cherry, an individual. Parsons Steel, Inc., a corporation, is a duly organized and existing corporation organized and incorporated under the laws of the State of Alabama. Parsons Steel, Inc., a corporation, was the "parent" company of Parsons Steel Industries, Inc., a corporation, the bankrupt in the case, and owned all the outstanding shares of stock in the bankrupt. Jimmy Douglas Parsons is an individual over the age of nineteen (19) years believed to be residing at Irvington, Mobile, Alabama. Mr. Parsons was formerly the President of Parsons Steel Industries, Inc., a corporation, the bankrupt. Melba L. Parsons is an individual over the age of nineteen (19) years believed to be residing at Irvington, Mobile, Alabama. She was formerly the Secretary-Treasurer of Parsons Steel Industries, Inc., a corporation, the bankrupt herein and is the majority stockholder of Parsons Steel, Inc.. Joe L. Cherry is an individual over the age of nineteen (19) years believed to be residing in Mobile, Alabama. Mr. Cherry is believed to be now and has been in the past the President of Parsons Steel, Inc., a corporation, one of the defendants herein.

(3) Plaintiff-trustee is seeking herein to recover monies and property of the bankrupt estate of Parsons Steel Industries, Inc., a corporation, from the defendants herein.

(4) On to-wit: March 6, 1979, defendant Jimmy Douglas Parsons executed and delivered to the Coggin Agency a check drawn on the bank account of Parsons Steel Industries, Inc., a corporation, at Exchange National Bank of Montgomery. A copy of the check is attached hereto as Exhibit "A". This check was paid to Pat Coggins, a real estate agent in Mobile, Alabama, as a binder or down payment for a home for defendants Jimmy D. Parsons and Melba L. Parsons which they purchased together taking title jointly with right of survivorship. Said home is presently being occupied by defendants Jimmy Parsons and Melba Parsons and is in Irvington in Mobile County, Alabama. At the time of the execution of the check, Parsons Steel Industries, Inc., a corporation, was insolvent and defendants Jimmy D. Parsons and Melba Parsons knew it was insolvent. The expenditure of the funds was not for a legitimate corporate purpose, but rather for the personal benefit of the defendants Jimmy D. Parsons and Melba Parsons. Plaintiff prays the Court will order said defendants to return said sum of money plus interest immediately, and will give plaintiff a judgment against each of them, separately and severally in the amount of Five Thousand and no/100 ($5000.00) Dollars plus interest.

(5) During calendar year 1978 Defendant Melba Parsons was paid a total of Ten Thousand and no/100 ($10,000.00) Dollars in salary by Parsons Steel Industries, Inc., a corporation, your bankrupt. Defendant did nothing to earn this money and by her own admission did not work for the bankrupt that year, did not perform any services whatsoever. Defendant Melba Parsons knew or should have known when this money was paid to her that Parsons Steel Industries, Inc., a corporation was insolvent. Plaintiff prays the Court will order defendant Melba Parsons to return to plaintiff the said sum of money paid to her for her work, labor and services never rendered by her, immediately, and further plaintiff prays this Court will give plaintiff a judg-

ment against defendant Melba Parsons in the amount of Ten Thousand and no/100 ($10,000.00) Dollars plus interest since the money was paid to her.

(6) Plaintiff would show this Court that on December 31, 1978, at a time when Parsons Steel Industries, Inc., a corporation, was insolvent, defendant Jimmy D. Parsons was paid a bonus of Ten Thousand and no/100 ($10,000.00) Dollars. Plaintiff would allege this is an unwarranted transfer of monies of Parsons Steel Industries, Inc., which should belong to this estate. Said bonus was used by defendant Jimmy D. Parsons to purchase two (2) automobiles and one (1) dictating machine from Parsons Steel Industries, Inc. Plaintiff believes the bonus paid to Parsons was nothing more than a paper transaction between defendant Jimmy D. Parsons and an insolvent Parsons Steel Industries, Inc. to accomplish the transfer to defendant Jimmy D. Parsons the automobiles and dictating equipment belonging to Parsons Steel Industries, Inc. The automobiles "purchased" by defendant Jimmy D. Parsons or transferred to him are one (1) Volkswagen Model 1811 Thing automobile, VIN#1842219993 and one (1) 19_____ Lincoln Mark IV automobile, VIN#_____. Plaintiff prays this Court will order defendant Jimmy D. Parsons to return this bonus to this estate, and will grant plaintiff a judgment in the sum of Ten Thousand and no/100 ($10,000.00) Dollars plus interest since the money was paid to him.

(7) During calendar year 1978 Parsons Steel Industries, Inc., while insolvent, paid the insurance premiums on automobiles owned by defendant Jimmy D. Parsons. Plaintiff prays this Court will order said defendant to make an accounting of all such funds paid to or for the benefit of defendant for car insurance premiums on automobiles owned by him or defendant Melba Parsons by Parsons Steel Industries, Inc., and will order said defendants to repay to this estate all such funds. Plaintiff further prays this Court will grant plaintiff a judgment against defendants Jimmy D. Parsons and Melba Parsons as their liability appears including interest.

(8) On to-wit: March 8, 1979 defendant Jimmy D. Parsons negotiated a settlement of an account or contract right belonging to Parsons Steel Industries, Inc. Specifically, defendant Jimmy D. Parsons, as President of Parsons Steel Industries, Inc., settled an account or claim of Parsons Steel Industries, Inc. with P. A. Arnold Construction Company, Inc. for the sum of Eight Thousand Three Hundred and Thirty Four ($8334.00) Dollars. A copy of a release document defendant Jimmy D. Parsons signed is attached hereto as Exhibit "B". Plaintiff believes defendant Jimmy D. Parsons converted said sum of money to his own use. Plaintiff would show the Court that the money paid to settle the account was never deposited in any bank account of Parsons Steel Industries, Inc. Plaintiff prays this Court will order defendant Jimmy D. Parsons to return said sum to this estate to whom it rightfully belongs immediately, and that this Court will grant plaintiff a judgment against defendant Jimmy D. Parsons in the sum of Eight Thousand Three Hundred Thirty Four ($8334.00) Dollars plus interest since March 8, 1979.

(9) During calendar year 1978 and during other calendar years Parsons Steel Industries, Inc., a corporation, sold scrap metal from time to time. The income accounts for the company for 1978 do not reflect any income received by Parsons Steel Industries, Inc. for the sale of scrap. Plaintiff is aware that a company in the Montgomery, Alabama area, namely MIMCO, has records indicating it purchased from Parsons Steel Industries, Inc. scrap steel and metal for which it paid a total of Eighteen Thousand Eight Hundred Ninety Four and 68/100 ($18,894.68) Dollars. Plaintiff cannot find where any of this money was ever received by Parsons Steel Industries, Inc., and plaintiff believes that defendant Jimmy D. Parsons converted said funds and possibly others to his own use. Plaintiff prays this Court will order defendant Jimmy D. Parsons to make an accounting of all funds received by him for the sale of scrap belonging to Parsons Steel Industries, Inc., and will order him to return that money plus interest immediately. Plaintiff prays this Court will grant

plaintiff a judgment against defendant Jimmy D. Parsons for the total sum received by him for the sale of scrap plus interest.

(10) On to-wit: June 12, 1978, Parsons Steel Industries, Inc., a corporation, sold or transferred to defendant Joe L. Cherry a metal building which was the property of Parsons Steel Industries, Inc. Cherry, who was then President of defendant Parsons Steel, Inc., a corporation, agreed to pay the company the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars for the building. On September 31, 1978 when Parsons Steel Industries, Inc. was insolvent and less than three (3) months after the "sale" of the building to defendant Cherry, the debt was entered on the books of Parsons Steel Industries, Inc. as a bad debt write-off, and in essence the debt was forgiven. Wherefore Plaintiff prays this Court will grant plaintiff a judgment against defendant Joe L. Cherry in the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars plus interest, or the true value of the building, whichever sum is greater.

(11) The records and ledgers of Parsons Steel Industries, Inc. show that on December 31, 1978 defendant Parsons Steel, Inc., a corporation, owed this estate a sizeable debt which plaintiff believes amounts to Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars. Said money has not been paid and is still due by Parsons Steel, Inc. Of this amount, One Hundred Thousand ($100,000.00) Dollars represents amounts paid by Parsons Steel Industries, Inc. to Mr. E. W. Hodge to reduce the debt defendant Parsons Steel, Inc. owed him for the purchase of the company and assets which came to be Parsons Steel Industries, Inc. In addition, Parsons Steel Industries, Inc., at a time when it was insolvent, paid One Hundred Fifty Four Thousand Eight Hundred Eight and 96/100 ($154,808.96) Dollars on August 30, 1978, to a trade creditor of defendant Parsons Steel, Inc. Wherefore plaintiff prays this Court will grant plaintiff a judgment against defendant Parsons Steel, Inc. in the amount of Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars plus interest since December 31, 1978.

WHEREFORE THE PREMISES CONSIDERED, plaintiff demands judgment against the respective defendants as follows:

(a) A judgment against defendant Jimmy D. Parsons for the sum of Forty Two Thousand Two Hundred Twenty Eight and 68/100 ($42,228.68) Dollars pursuant to paragraphs 4, 6, 7, 8 and 9 of this complaint plus interest on said sum. Plaintiff further demands judgment against defendant Jimmy D. Parsons for an accounting of any and all monies he received for the sale of scrap metal belonging to Parsons Steel Industries, Inc. not itemized above, and for any sum paid by Parsons Steel Industries, Inc. for car insurance premiums for automobiles owned by Jimmy D. Parsons, and demands judgment against him for any such amount.

(b) A judgment against defendant Melba Parsons in the amount of Fifteen Thousand ($15,000.00) Dollars plus interest pursuant to paragraphs 4, 5 and 7 of this complaint. Plaintiff further demands judgment against defendant Melba Parsons for an accunting of any and all sums paid by Parsons Steel Industries, Inc. for car insurance premiums for automobiles owned by her, and demands a judgment against her for any such sum.

(c) A judgment against defendant Joe L. Cherry for the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars plus interest pursuant to paragraph 10 of this complaint.

(d) A judgment against defendant Parsons Steel, Inc., a corporation, for the sum of Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars plus interest pursuant to paragraph 11 of this complaint.

(e) Plaintiff prays for such other or further relief to which it is entitled.

Respectfully submitted,

A. Pope Gordon, Trustee

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me the undersigned, an officer authorized to adminster oaths, Jim Parsons who states and deposes that he is President of Parsons Steel Industries, Inc., 110 Birmingham Highway, Montgomery, Alabama, who being duly sworn deposes and says on oath that Parsons Steel Industries, Inc., has furnished to P. A. Arnold Construction Company, Inc., certain materials, including a steel building, for use in the project known as Georgia Power Line Crew Headquarters, Winder, Georgis, under and by virtue of a contract between Parsons Steel Industries, Inc. and P. A. Arnold Construction Company, Inc.

Deponent, on behalf of Parsons Steel Industries, Inc., in consideration of the sum of eight thousand three hundred and thirty four Dollars, representing the entire contract price due to Parsons Steel Industries, Inc., receipt of which is hereby acknowledged, does hereby waive, release and quit claim in favor of Aderhold Construction Company and its successors or assigns, all rights that it may now or hereafter have to a lien upon the land and improvements above described; deponent further warrants that Parsons Steel Industries, Inc. has not and will not assign its claim for payment; that it has not and will not perfect a lien against said property; and he has the right to execute this waiver and release of lien.

Jim D. Parsons

Sworn to and subscribed before me
this 8th day of March, 1979.

Myrtle Wood
Notary Public,

Mobile County, Alabama

My commission expires 11-13-82

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 83-7395
[Caption Omitted]

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

Pursuant to Rule 17(c) (8) and (10) of the Rules of this Court, Plaintiffs-Appellees move the Court to supplement the record on appeal by including therein the entire record from *Parsons Steel, Inc. et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, in the United States District Court for the Middle District of Alabama, on the following grounds:

1. The instant appeal is from an injuction issued by the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C.A. § 2283, to protect and effectuate its earlier judgment of June 17, 1981 in *Parsons Steel, Inc. et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, which was affirmed by this Court in *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.* (No. 81-7556), 679 F.2d 242, decided by this Court on June 25, 1982.

2. It was stipulated by the parties and agreed by the Court that the Court take judicial notice of the entire Court file in the prior case, as evidenced by the following excerpt from the record of the hearing on the complaint for injunction in this action.

MR. WILSON:

> "* * * I would first like to ask the Court if it would be appropriate for this Court to take judicial notice of the matters in the federal litigation which, of course, was tired before this Court?

THE COURT:

> "It is appropriate for the Court to take judicial konwledge of it. But I, like Mr. Nachman, I don't

completely trust my recollection. I want each of you to feel free to contribute to my recollection of what is in the record in the federal case. I know you have all reviewed it since I have, and I don't pretend to remember everything. * * *

MR. NACHMAN:

"I just wanted to say that I would stipulate, Your Honor, that any party can ask the Court to take judicial notice of any of the materials on file in the federal action, if that would help.

THE COURT:

"Thank you."

(R. 8-9)

Pursuant to that stipulation, the Court did take judicial notice of the record from *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, as evidenced by the opinion of the district court in this case entered June 15, 1983. The Court expressly referred to pleadings in the prior case (p.1, 5 and 6); the evidence in the prior federal case (p.4, 12, 13-15); the depositions in the prior case (p.7).

Respectfully submitted,

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Attorneys for
Plaintiffs-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 83-7395
[Caption Omitted]

ORDER

ORDER:

IT IS ORDERED that the motion of appellees to supplement the record on appeal is granted subject to a determination of relevance by the panel to whom this appeal is submitted for disposition on its merits.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

TRUSTEE'S CLAIMS

COMES NOW the Honorable A. Pope Gordon, Trustee in Bankruptcy, by and through counsel, in response to the Court's Order of February 6, 1985, and states its UCC claims and statutory bases therefor in the above-referenced case:

The Trustee alleges that the Defendant First Alabama Bank of Montgomery, N.A. (hereinafter referred to as "First Alabama") conducted a commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. (hereinafter referred to as "PSII") after a foreclosure in January of 1979. Such conduct failed to comply with the requirements of §7-9-507 and 7-9-504, *Code of Alabama,* 1975. Under §7-9-507, Trustee is entitled to recoup any "loss" caused by First Alabama's failure to comply with §7-9-504(3). Additionally, §7-9-504 requires that any sale is subject to the articles

on sales; and §7-1-201, *Code of Alabama,* 1975, imposes an obligation of good faith in the performance or enforcement of any contract or duty for sales. Trustee contends that the commercially unreasonable sale of PSII's assets by First Alabama infringed on the unsecured creditors' legal rights to the equity over and above the price for which the property was sold, a price Trustee contends was grossly inadequate.

I. Section 7-9-507(2) provides that:

> . . . If the secured party either (1) sells the collateral in the usual manner in any recognized market therefor or (2) if he sells at the price current in such market at the time of his sale or (3) if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner. . . .

Trustee alleges that the sale in this case was not made in accordance with the three methods of sale as set forth in §7-9-507(2), to wit:

(1) Trustee alleges that there is no "recognized market" for the sale of an entire industrial plant.

(2) Trustee alleges that the price paid by Michael Orange to First Alabama was not a "price current in such market at the time of the sale" but was merely calculated by determining an amount equal to the amount of debt owed to First Alabama by PSII.

(3) Trustee alleges that the sale was not in conformity with "reasonable commercial practices among dealers in the type of property sold" for to have been so, would have required notice of such a sale to prospective buyers within the steel business in Central Alabama.

II. Section 7-9-504(3) provides that:

> . . .every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

Trustee alleges that the place, manner, method and terms of the private sale were not commercially reasonable and, therefore not in compliance with §7-9-504(3), *Code of Alabama,* 1975, to wit:

(1) Disposition of the collateral was made at a private sale two days after repossession by First Alabama.

(2) Only one prospective buyer was notified of the private sale by First Alabama.

(3) The buyer of the collateral had no prior experience in the steel industry and no prior knowledge of the value of the real estate, inventory, equipment, or facilities used by this particular business.

(4) No attempt was made by First Alabama, or any of its agents, to contact any person, firm, or corporation in the steel industry or any unsecured creditor of PSII as to the date and time of the private sale.

(5) No notice of the private sale was given to the attorney for PSII at that time by First Alabama or any of its agents, until one day after the private sale.

(6) No notification of the sale was placed in any industry or trade publication, or any newspaper, magazine or publication of any sort concerning the private sale.

(7) The only persons in attendance at the private sale were Michael Orange, his attorney, and Defendant Ed Herbert as agent for First Alabama.

(8) The place of the private sale was not at the plant site, or any other public place, but rather in the private office of Defendant Herbert located at First Alabama.

(9) Only one bid was received by First Alabama to purchase the assets of PSII and that bid came from Michael Orange.

(10) The price paid by Michael Orange for the collateral was not determined by estimates of fair market value or by a price which could be obtained from dealers in the kind of assets purchased, but rather by a determination of the amount of indebtedness owed to First Alabama by PSII at that time. The only factor considered by First Alabama in determining the sales price for the collateral was that figure.

(11) The actual value of the collateral was in excess of $2.5 million, and the $907,252.85 paid by Michael Orange was grossly inadequate thereby raising the presumption that the sale was held in bad faith.

James Jerry Wood

Attorney for Trustee

OF COUNSEL:
Wood, Minor & Parnell, P.A.
P.O. Box 4189
Montgomery, AL 36103
832-4202

EXHIBIT "B"

[R-1447] Q. Can you tell the Court and the Jury what reasons the First Alabama Bank had for conducting a private rather than a public sale on the Courthouse steps?

A. Had someone there who said they would take over the debt and try to pay the debt off.

Q. All right. Was the reason for you doing it that way because you had Michael Orange there and he was willing to do it?

A. It had already been offered to Ajax Atlas and Michael Orange and they wouldn't buy it and we had a willing person who would take it over.

Q. Was the reason because you had Michael Orange there?

A. Yes.

Q. Was that the only reason?

A. No, but it was a convenient way to do it.

Q. If Jerry Wood had arrived there that day with the money, would you have sold the property to him?

A. I you had had the cash I would have sold it to you in a minute.

Q. But I didn't have any way of knowing about it, did I?

A. No.

Q. These creditors that you'd been talking to through the month of December didn't have any way of knowing either, did they?

A. They knew when they had to respond.

Q. Yes, sir. But they didn't know you were going to sell it, did they?

A. I think it was pretty obvious that it was going to

EXHIBIT "C"

[R-1204] . . . of them we hadn't heard from at all. They hadn't said yes, they hadn't said no. But the first thing I knew about what actually had occurred was, I was in Court taking depositions, I believe, it was on the the eighteenth. I first thought it was another date but I checked my notes and now I know it was the eighteenth. I got word, someone told me Jim Parsons was in may office and wanted to see me. I came into my office. He was out front and he looked very bad. He looked like a man that hadn't shaved for three or four days and just bad generally. And he asked, he said he just wanted to talk for five minutes. I explained I was in Court and so he came back to my office. He said I have some shocking news for you. I think, first, he said do you represent Mike Orange and I said no, I've never represented him, I represent the company. He said he had some shocking news for me and he told me there had been a repossession that had occurred, I believe he said, on the fifteenth. This conversation would be like on a Thursday and he was referring to the repossession that would happen say three days before on Monday. He went on and he said that, he first wasn't going to tell me who bought it and then later said in the conversation that it had been purchased by a corporation that Mike Orange had control of. I was very angry because no one had talked to me about these things and, you know, I had written the creditors and I didn't want them to think that I had not told them what I knew. I kept saying . . .

EXHIBIT "D"

[R-1446] Q. Where was the sale of these repossessed properties?

A. In my office.

Q. Who was present?

A. I believe, Mr. Hardegree, Mr. Orange and myself.

Q. Just three of you?

A. I believe that's correct.

Q. Who decided that we would have a private sale rather than a public sale?

A. I discussed this in advance with Mr. Parsons.

Q. Did you discuss it with anyone else?

A. No.

Q. Did you discuss it with your lawyers?

A. I think I did.

Q. Luther Ingles?

A. I think so.

Q. All right. You put in this note to Parsons, that's in evidence, waiving his five day notice under the Code that you complied with certain provisions of the Uniform Commercial Code. Are you familiar with that?

A. Yes.

Q. Who told you that complied with the Code?

A. The attorney.

Q. Who?

A. Luther Ingles.

Q. Did he tell you that on the Fifteenth of January?

A. I don't think so. I think it was prior to the Fifteenth.

EXHIBIT "E"

[R-1448] go into foreclosure if they didn't accept.

Q. No, sir. Let me ask you this. Did you tell any of them that you were going to do it?

A. I think it implies that in the composition letter to the creditors.

Q. Did you tell Sam Kaufman, the attorney for Parsons Steel Industries, that you were going to do it or had done it?

A. No.

Q. Mr. Herbert, tell the Court and Jury whether or not any of these goods were perishable goods that required you to do something immediately?

A. Not to my knowledge.

Q. You didn't have any lettuce or produce or anything of that kind, did you?

A. No.

Q. It was all stable, hard goods?

A. To my knowledge. I don't know of anything perishable.

Q. When you did this private sale to Mike Orange because he was there, did you consider the nature and character of these goods?

A. I don't know that that came into it.

Q. When Henry Hardegree and Orange and you were there, did you pick up the telephone and call anybody and say you were going to conduct the sale at ten o'clock?

A. I had already given written notice to Mr. Parsons.

* * *

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

A. No.

Q. Did you make any effort to find out?

A. No.

Q. Did you talk to any steel brokers?

A. No.

Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

A. No.

Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

A. Yes, I did. He was a good customer.

Q. Wouldn't it have been important for the bank to ask Ed Hodge what this was worth at the time you were selling it?

A. I didn't consider that he was part of it at the time. He had already sold out and was gone.

Q. You didn't talk to Aesco Steel?

A. No.

Q. Mimco?

A. No.

Q. Nobody here?

A. No.

Q. Those people are local people, aren't they, Aesco and Mimco?

EXHIBIT "F"

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Q. No, sir. Let me ask you this. Did you tell any of them that you were going to do it?

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* * *

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

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Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

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Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

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Q. Mimco?

A. No.

Q. Nobody here?

A. No.

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EXHIBIT "G"

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Q. All right. Was the reason for you doing it that way because you had Michael Orange there and he was willing to do it?

A. It had already been offered to Ajax Atlas and Michael Orange and they wouldn't buy it and we had a willing person who would take it over.

Q. Was the reason because you had Michael Orange there?

A. Yes.

Q. Was that the only reason?

A. No, but it was a convenient way to do it.

Q. If Jerry Wood had arrived there that day with the money, would you have sold the property to him?

A. I you had had the cash I would have sold it to you in a minute.

Q. But I didn't have any way of knowing about it, did I?

A. No.

Q. These creditors that you'd been talking to through the month of December didn't have any way of knowing either, did they?

A. They knew when they had to respond.

Q. Yes, sir. But they didn't know you were going to sell it, did they?

A. I think it was pretty obvious that it was going to

EXHIBIT "H"

[R-1205] Jim, why didn't you inform me, why didn't anyone inform me what was going on. He said, first said that it was Mike's responsiblity and then later in the conversation though Mike had resigned. Anyway, I was left up in the air. He left and I went back to Court and I finished with my Court case around

four, came back and I called Mike. This is the conversation you're referring to, correct?

Q. Correct.

A. And I asked Mike what had happened. He said there had been a foreclosure. I said when did it happen? He said on the fifteenth. I said well there wasn't any notice and he said well we received notice from the bank, I think, he mentioned maybe the tenth or the eleventh. We received notice from the bank last week and the plan was, had you gotten necessary acceptances the notice would have been torn up. And I said why didn't you tell me these things Mike, you were chief executive officer. And he said, well I resigned and it was Jim Parsons' job to tell you. I said, you know, nobody told me you resigned and everybody agreed that I didn't know that. Then I said who bought it? I asked him three times. I thought, you know, that his corporation had bought it but I didn't ask him that, I just said who bought it and he said that I would have to get that information from Ed Herbert, that Ed would have to tell me who purchased it or what. I mean, I said what disposition was made. At that point he didn't even tell . . .

EXHIBIT "I"

[R-1446] Q. Where was the sale of these repossessed properties?

A. In my office.

Q. Who was present?

A. I believe, Mr. Hardegree, Mr. Orange and myself.

Q. Just three of you?

A. I believe that's correct.

Q. Who decided that we would have a private sale rather than a public sale?

A. I discussed this in advance with Mr. Parsons.

Q. Did you discuss it with anyone else?

A. No.

Q. Did you discuss it with your lawyers?

A. I think I did.

Q. Luther Ingles?

A. I think so.

Q. All right. You put in this note to Parsons, that's in evidence, waiving his five day notice under the Code that you complied with certain provisions of the Uniform Commercial Code. Are you familiar with that?

A. Yes.

Q. Who told you that complied with the Code?

A. The attorney. .

Q. Who?

A. Luther Ingles.

Q. Did he tell you that on the Fifteenth of January?

A. I don't think so. I think it was prior to the Fifteenth.

EXHIBIT "J"

[R-1444] A. No, I didn't ask them.

Q. You don't know whether or not they had seen the property, do you?

A. They said they were familar with the property.

Q. Yes, sir. They both said that in the meeting?

A. Yes.

Q. Was there any discussion about an overhead crane, how much they would be worth?

A. No.

Q. It was just a discussion conversation?

A. That's correct.

Q. And you're telling the Court and Jury that that was your basis for discounting the land value?

A. No. I was trying to find out, before I put out any more money, another hundred and seventy-six thousand dollars, if I got back a first mortgage on all the property whether I would be in the ball park for the two hundred that was already owing and another hundred and seventy-six thousand dollars. I certainly didn't want to put out more money than it would be worth. Our best opinion was that it was worth some additional funds.

Q. All right, sir. Let me ask you these questions. What was the inventory worth of Parsons Steel Industries, Inc. on January 15th, 1979?

A. The only way you can tell what inventory is worth is to sell it.

[R-1445] Q. Did you know?

A. No.

Q. You didn't know? What was the real estate of Parsons Steel and Parsons Steel Industries worth on that day?

A. I don't know.

Q. You know that seven acres of this twenty-five acres belonged to the Montgomery company, don't you?

A. I don't recall what belonged to whom. I recall, it was something like twenty-five or twenty-six acres involved.

Q. What was the equipment of Parsons Steel Industries, Inc. worth on January the 15th, 1979?

A. I have no idea what it was worth.

Q. Were your answer be the same for the tooling?

A. Yes.

Q. Or any other asset?

A. I'm not an appraiser.

Q. And you got no appraisal?

A. I had the one appraisal there and I took his book value.

Q. Larson Edge's appraisal?

A. Yes. Looked at both of them.

Q. Prior to selling this at a private sale, you didn't make any effort to determine the market value of this property?

A. No.

Q. Real or personal?

A. No.

* * *

[R-1449] He knew about it.

Q. Did you call anybody?

A. No.

Q. When you were arranging this private sale, did you consider whether or not there was a market, a ready market for steel plants or used steel plants?

A. I figured if there had been Mr. Parsons would have sold it.

Q. I'm asking what you considered?

A. No.

Q. You didn't do that, did you?

A. No.

Q. There was nobody you could call that deals in these things all the time, was there, Mr. Herbert?

A. Not to my knowledge.

Q. So you considered the relevant trade practices. You didn't know of a ready market place for the plant and the real estate?

A. No.

Q. How did you calculate the price?

A. I added up what Mr. Parsons owed me. I added the interest and then added an extra hundred and seventy-six thousand dollars that he needed to pay Mr. Hodge off and that's what the figure came from.

Q. Did the fair market value of any of these goods enter into your calculations whatsoever?

A. No.

Q. Do you know whether or not the price you obtained

EXHIBIT "K"

[R-699] is a sale that you compare to the property that you are appraising. Yes, sir.

Q. Did you make such an appraisal and come up with an opinion as to the market value of both the land and buildings of Parsons complex, we'll call it, here in Montgomery County?

A. I did, yes, sir.

Q. And what was the amount of that appraisal?

A. One million three thousand dollars.

Q. Would that include land and buildings?

A. Land and buildings, yes, sir.

Q. How much per acre did you put on the land?

A. Eight thousand dollars per acre.

Q. And on the buildings, did you go through and make an evaluation of the type of buildings and go through the normal course of events in making an appraisal on a structure of that type?

A. Yes, sir, I did.

Q. And taking depreciation away also?

A. That's correct, yes, sir.

Q. Do you recall the depreciation figures that you used?

A. Well, I have it here in the report.

Q. All right. Would you tell us what percentage of depreciation, type of depreciation you took away from the building values?

A. Of course it varied from building to building, according to the condition and age, but the first

EXHIBIT "L"

[R-1449] He knew about it.

Q. Did you call anybody?

A. No.

Q. When you were arranging this private sale, did you consider whether or not there was a market, a ready market for steel plants or used steel plants?

A. I figured if there had been Mr. Parsons would have sold it.

Q. I'm asking what you considered?

A. No.

Q. You didn't do that, did you?

A. No.

Q. There was nobody you could call that deals in these things all the time, was there, Mr. Herbert?

A. Not to my knowledge.

Q. So you considered the relevant trade practices. You didn't know of a ready market place for the plant and the real estate?

A. No.

Q. How did you calculate the price?

A. I added up what Mr. Parsons owed me. I added the interest and then added an extra hundred and seventy-six thousand dollars that he needed to pay Mr. Hodge off and that's what the figure came from.

Q. Did the fair market value of any of these goods enter into your calculations whatsoever?

A. No.

Q. Do you know whether or not the price you obtained

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

A. No.

Q. Did you make any effort to find out?

A. No.

Q. Did you talk to any steel brokers?

A. No.

Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

A. No.

Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

A. Yes, I did. He was a good customer.

Q. Wouldn't it have been important for the bank to ask Ed Hodge what this was worth at the time you were selling it?

A. I didn't consider that he was part of it at the time. He had already sold out and was gone.

Q. You didn't talk to Aesco Steel?

A. No.

Q. Mimco?

A. No.

Q. Nobody here?

A. No.

Q. Those people are local people, aren't they, Aesco and Mimco?

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

PLAINTIFFS' RESPONSE TO TRUSTEE'S CLAIM

This response is filed by Plaintiffs First Alabama Bank of Montgomery, N.A., and Edward Herbert (collectively referred to hereinafter as Bank) to the document entitled, "Trustee's Claims" filed February 21, 1985, pursuant to the Court's Order following the opinion of the Eleventh Circuit in this case. The Eleventh Circuit affirmed in its entirety this Court's injunction against further prosecution and enforcement of all of Trustee's state court claims which had resulted in a state court judgment. The Eleventh Circuit remanded, however, to permit this Court to determine whether the injunction "should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale." (747 F.2d at 1381) The Court of Appeals held that there should be *no modification* of this Court's prior injunction, as to the Trustee,[1] in the following circumstances:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and fraud claims. The Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of these matters." (747 F.2d at 1380)

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[1] As this Court knows, there is to be no modification at all as to other defendants in any circumstance.
(747 F.2d at 1380)

In short, if the Trustee should seek modification of the injunction—which to date he has not sought—he will have to convince this Court that his earlier UCC claim in state court was not based "solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price." (747 F.2d at 1373, n. 11)

This response will demonstrate that the Trustee's entire UCC claim in the state court—from his pleadings at the commencement of the case to his jury argument at the close[2]—was based upon such alleged improprieties involving Bank and Orange, and that there was no other basis. Accordingly, this Court's injunction should not be modified, even if the Trustee should seek modification.

The initial state court complaint of Parsons-Montgomery was filed before bankruptcy by the lawyers for all of the Parsons' interests. In May and June of 1982—after bankruptcy in early 1979, after extensive proceedings in the bankruptcy court, and after the Trustee was involuntarily brought into the state court action[3]—the Trustee, over protests of the Bank, was permitted to amend this complaint and to adopt the first 37 grounds of the original Parsons-Montgomery complaint.

The factual basis for the Trustee's UCC claim of commercial unreasonableness was alleged in those first 37 paragraphs and is summarized in Paragraph 37:

> "As a result of the scheme and plan set in operation by Defendants 'Herbert' and 'Orange' as described hereinabove, plaintiff 'Industries' lost an on-going business, including all of its assets and properties of every

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[2] Certified copies of all proceedings or documents referred to herein are filed contemporaneously herewith, except the state court complaints which are already Exhibit to the Bank's complaint in this Court.

[3] The Eleventh Circuit observed that the Trustee "was involuntarily joined as a party plaintiff." (747 F.2d at 1378)

> kind and description, was effectively rendered insolvent and left with approximately $840,000 owed to unsecured creditors as of January 17, 1979."

The remainder of Count IX simply alleged in conclusory terms that the sale was conducted in a commercially unreasonable manner; that the time and terms of the sale were commercially unreasonable; that Parsons-Montgomery did not receive reasonable notification; and that Orange and OSI, as purchasers of the collateral, failed to act in good faith, resulting in the loss of the assets of Parsons-Montgomery. There are no factual allegations concernign improper conduct of the foreclosure sale. The focus of the complaint is that the alleged improprieties between the Bank and Orange resulted in the alleged insufficient sales price.

In his Statement of Contentions filed in state court on January 14, 1983 and on the eve of trial, Trustee again restricted his UCC allegations to alleged wrongdoing between Bank and Orange prior to the sale. For example:

> "10...[F]rom November 1978 to January 17, 1979, Herbert and Orange were working in concert to acquire the business owned and operated by 'Industries' in Montgomery County, Alabama for Defendant Orange. The methods by which Defendant Orange took possession and obtained title to the assets and properties of 'Industries' could never have happened as it did without the active participation and assistance of Defendant Herbert as an officer, agent and employee of Defendant First Alabama Bank.
>
> 11. That Defendant First Alabama Bank, acting by and through ... Defendant Herbert, and Defendant OSI, Inc., acting by and through ... Orange actively participated in the scheme described hereinabove to take over the operation of the business affairs of 'Industries' ... which amounted to collusion between said Defendants to do

great damage and economic harm to Plaintifff, 'Industries', and the unsecured creditors of 'Industries,' said scheme effectively putting 'Industries' out of business for all practical purposes."

The only specific reference to the UCC claim was the conclusory contention in Paragraph 19: "That the private sale and disposition of the assets of the corporation conducted on or about January 17, 1979 was done so in a commercially unreasonable fashion."

Trustee's counsel, in opening statement in the state case (R61-62), adopted "Mr. Beasley's statement of what we expect the evidence to show."

Finally, in his closing argument to the jury, counsel for Trustee argued:

> "...Let me talk to you just briefly about the commercial reasonableness.
>
> You remember I asked Mr. Herbert certain questions very carefully from down here at the end of the rail and I tried to get an answer to those things I asked him about value of inventory. I don't know. Didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel...And then the first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. You think about it.
>
> . . .
>
> [Parsons-Montgomery is] entitled to recover on the commercial reasonableness because there was nothing reasonable about any aspect of the sale. There was only one bidder there. One person, one buyer. *It was all prearranged. It was done in secret.* It was done in a hidden

fashion. It was done in a hidden fashion, because first of all you've got a corporation that was formed especially for it, and didn't even have Orange's name on it. You think they didn't start trying to do this on January 5? It worked out just like it happened. You come up on the 19th, and we've got nothing left. The bank says, we're secured. We got Mike Orange. We got good management. We're without the debt. Sure, the company can do a lot better. It has done pretty well. Mr. Orange says he's reduced the debt from one point three to nine hundred thousand. He is still operating. He sold about six hundred thousand dollars worth of equipment and a lot of inventory. They could have paid these creditors if they had done it right. If they had done it right. They didn't do it right. This was commercially unreasonable because they ignored the values of this property. They handled it quietly. They say Jim Parsons waived notice,[4] but you notice on those letters they even changed the time from 10 to 2. They didn't want anybody else there. *They were going to sell it to Michael Orange. They made that decision way bakc on the 10th or 11th.* They said, you heard me ask Mr. Herbert, if I come with the money, sure we would have sold it to you. How was I going to know about it? They didn't call Ed Hodge, and say Mr. Hodge, do you want to but it back? They didn't want to work it out. Every aspect of the sale was commercially unreasonable. There is not one piece of evidence that should suggest to you that it was a commercially reasonable sale." R1573-1576. (emphasis supplied)

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[4] The Eleventh Circuit has recognized this Court's preclusion of inquiry into this alleged wrongdoing by this Court's finding in the first *Parsons* case, "that the Parsons waived the notice requirement," leaving open only the question of whether the actual sale was commercially unreasonable. This issue amounts simply to a claim that the price at the sale was insufficient." (747 F.2d at 1373).

Plainly, therefore, the Trustee's state court UCC claim of commercial unreasonableness was based solely on alleged improprieties involving the Bank and Orange prior to the sale. The Trustee asserts, moreover, that these improprieties resulted in an alleged unfairly low price. There were no allegations or attempted proof about mishandling of the *actual sale,* other than allegations that no one else was notified and no one else was there because the sale to Orange was prearranged and agreed upon. The Trustee simply cannot say now that, in state court, the "UCC claim [was] based on alleged improprieties connected with the conduct of the foreclosure sale itself (*separate and apart from any of the events leading up to the sale).*" (747 F.2d at 1380) (emphasis supplied) On the contrary, it is clear that the Trustee's claim "rests on the same allegations of pre-sale improprieties that formed the basis of the fraud and BHCA claims." (*Ibid.*) Accordingly, this Court's injunction should not be modified in any respect.

Respectfully submitted,

/s/ M. Roland Nachman, Jr.

/s/ James A. Byram, Jr.

Attorneys for Plaintiff First Alabama Bank of Montgomery, N.A., et al.

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

STATEMENT OF CONTENTIONS OF PLAINTIFF, TRUSTEE IN BANKRUPTCY

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., by and through his attorneys, and makes the following statement of contentions:

1. That Parsons Steel Industries, Inc. (hereinafter referred to as "Industries") was an ongoing and solvent corporation in calendar year 1978.

2. That Defendant First Alabama Bank was the primary secured creditor of "Industries" as well as being the principal lender and supplier of commercial credit to "Industries".

3. That Defendant Ed Herbert was an agent and employee of Defendant First Alabama Bank and acted as counselor and advisor to "Industries" during calendar year 1978 and during January, 1979.

4. That Defendant Herbert forced "Industries" to hire Defendant Mike Orange and forced the Corporation to relinquish management control of the Corporation to Defendant Orange.

5. That a proposed composition of creditors was prepared by Defendants Herbert and Orange working in concert, and said Defendants wrongfully reduced the amount of assets of "Industries" showing on the balance sheet sent to all unsecured creditors under said proposed composition from Two Million Three Hundred Eighty-four Thousand Nine Hundred Forty-five and 89/100 Dollars ($2,384,945.84) to One Million Thirty-four Thousand Dollars ($1,034,000.00).

6. That the letter and statement which proposed the common law composition of creditors was fraudulent and misleading and

wrongfully portrayed the financial position of Plaintiff, "Industries", to the unsecured creditors.

7. That Defendant Bank, through its agent, Defendant Herbert, on or about January 8, 1979, advised "Industries", through its agent, Jim Parsons, that the total indebtedness owing to the Bank would become due and payable on January 15, 1979.

8. That the Bank notified "Industries" that it would sell all collateral security to satisfy the aforesaid loan at Defendant Herbert's office on January 17, 1979, at 2:00 p.m.

9. That on or about January 17, 1979, a private sale of all of the assets of "Industries" was made by First Alabama to Defendant OSI, Inc. at 10:00 a.m. (four hours prior to notice time), which purported to convey all rights and title to the said property and assets for a sale price of Nine Hundred Seven Thousand Dollars ($907,000.00). A bill of sale was executed and delivered by Defendant First Alabama Bank to Defendant OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of Nine Hundred Seven Thousand Two Hundred Fifty-two and 85/100 Dollars ($907,252.85) certain described personal property of Plaintiff "Industries".

10. That at all material times in 1978, and specifically from November, 1978, to January 17, 1979, Herbert and Orange were working in concert to acquire the business owned and operated by "Industries" in Mongtomery County, Alabama, for Defendant Orange. The methods by which Defendant Orange took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of Defendant Herbert as an officer, agent, and employee of Defendant First Alabama Bank.

11. That Defendant First Alabama Bank, acting by and through its officers, agents, or employees, including Defendant Herbert, and Defendant OSI, Inc., acting by and through its of-

ficers, agents, or employees, including Defendant Orange, actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries", including its assets and property which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiff, "Industries", and the unsecured creditors of "Industries", said scheme effectively putting "Industries" out of business for all practical purposes.

12. That Defendants First Alabama Bank, Edward Herbert, OSI, Inc., and Michael Orange intentionally, wilfully, and fraudulently deceived the unsecured creditors and stockholders of Parsons Steel Industries, Inc. and thus caused the loss of substantially all of the assets of "Industries" rendering the Corporation insolvent and forcing some of the unsecured creditors of "Industries" to put the Corporation in involuntary bankruptcy.

13. That Defendants Orange and OSI, Inc. wrongfully obtained property belonging to "Industries", thus depleting the assets of "Industries" and effectively rendering "Industries" insolvent.

14. That Defendants OSI, Inc., Mike Orange, Edward Herbert, and First Alabama Bank owed a fiduciary duty to the stockholders and unsecured creditors of "Industries" to ensure that the assets of "Industries" were not wasted. As a proximate cause of the failure to exercise their fiduciary duty to Plaintiffs, "Industries" suffered losses of substantially all of its assets rendering the Corporation insolvent.

15. That Defendants OSI, Inc. and Mike Orange wrongfully converted to their own use all of the assets of the Corporation.

16. That Defendants Mike Orange and OSI, Inc. wrongfully detained for their own use all of the assets of the Corporation.

17. That Defendants Mike Orange and OSI, Inc. have, subsequent to their purchase of "Industries", disposed of inventory

belonging to "Industries" for amounts far less than the market value.

18. That all of the Defendants fraudulently conspired to obtain all of the assets of "Industries" and did so in derogation of the unsecured creditors of "Industries".

19. That the private sale and disposition of the assets of the Corporation conducted on or about January 17, 1979, was done so in a commercially unreasonable fashion.

20. That Defendants Orange and OSI, Inc., by and through its predecessor in title, Standard Steel Building Systems, Inc., on or about January 12, 1979, executed and delivered to "Industries" a promissory note whereby said Defendants promised to pay "Industries" on order or demand the sum of Twenty-three Thousand Dollars ($23,000.00) with interest thereon at the rate of eight (8%) percent per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

21. That Defendants Orange and OSI, Inc. did wrongfully convert a life insurance policy on the life of Edward Hodge with a cash value of approximately Eight Thousand Dollars ($8,000.00) which was owned by "Industries". Plaintiff contends that Defendants Orange and OSI, Inc. have wrongfully converted to their own use said life insurance policy.

WHEREFORE, for the contentions described in Paragraphs 1-19 hereinabove, and for those contentions more fully described in Counts I-VIII of Plaintiff's Complaint as Amended, "Industries" claims compensatory and punitive damages from all Defendants separately and severally in the amount of Ten Million Dollars ($10,000,000.00). For the contentions described in Paragraph 20 hereinabove and Count X of Plaintiff's Complaint as Amended, Plaintiff "Industries" claims damages against Defendants Orange and OSI, Inc. in the amount of

Twenty-three Thousand Dollars ($23,000.00), interest, attorney's fees, and costs. For the contentions in Paragraph 21 described hereinabove, and for those contentions contained in Count XI of Plaintiff's Complaint as Amended, Plaintiff "Industries" claims damages against Defendants Orange and OSI, Inc. for the value of the life insurance policy referred in paragraph 21 above or in the alternative for return of said policy to Plaintiff "Industries".

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. DeBray

Attorneys for Trustee

[R-61] OPENING STATEMENTS

By Mr. Wood:

Ladies and Gentlemen, as Jere Beasley told you, Tom Debray and I represent Pope Gordon and the unsecured creditors who were creditors of Parsons Steel Industries, Montgomery at the time of the foreclosure by the bank. Let me just in the interest of time tell you that I adopt Mr. Beasley's statement of what we expect the evidence to show. Essentially, I agree with everything he has stated that the evidence is going to be. We're in the case because when the bankruptcy of Parsons Steel Industries of Montgomery came about, there were creditors who were owed eight hundred thousand plus or minus dollars. They had no notice of any foreclosure sale. The evidence will show that the bank obtained from Michael Orange enough to satisfy **[R-62]** the bank's debt but not any more for those creditors who didn't have any collateral or any security. We are here on their behalf in a representative capacity. We ask you to pay careful attention to the evidence as it comes to you. Mr. Beasley is correct. We are asking for a substantial amount of money. We have men, as unsecured creditors and as stockholders, substantially damaged in this case. So, give us your careful attention and we'll ask you to render a true verdict when it is over. Thank you.

* * * * *

[R-101] OPENING STATEMENTS

By Mr. Wood:

May it please the Court, Ladies and Gentlemen, just briefly. I know you are ready to start hearing the testimony and we are ready to get to it. Mr. Nachman did mention to you as you read from a document in another proceeding that certain statements were made by the trustee, Mr. Gordon. We expect if the Court lets that evidence come in, that there will be evidence that that information did indeed come from witnesses that were tied to

the bank. Certain officers of the bank. Certain lawyers for the bank and certain accountants. So those sworn answers and inconsistent positions somewhere else, we expect our evidence to show you where that information came from and how those allegations came to be. Thank you.

* * * * *

[1572] CLOSING STATEMENT

By Mr. Wood:

Ladies and Gentlemen, as y'all know from the first day I told you in opening statements that I represented Mr. Pope Gordon, and I've done that throughout this trial. You've watched me in tandem with the other Plaintiffs' lawyers talk about the evidence, and we've been in agreement on that. I come to you now behind Jere Beasley who has stated the evidence to you as I have seen it. He stated what he expects the Judge to say to you.

Let me, before I say anything to you, say at this time that I appreciate the fact that you've been here seven days. I'm not going to be here very long. I'm going to tell it as simply and directly as I know how why we're here, why we're in this lawsuit, why from the evidence you've heard from this stand there ought to be a recovery by Parsons Steel Industries, Inc., Montgomery. That is, my client, Pope Gordon, the Trustee. You've already heard testimony that we're here because **[R-1573]** Pope was appointed. He represents the interest of those people that Mr. Nachman has talked about in the evidence when he said, you know, this steel company, Paoli Steel, U.S. Steel - there's a lot of folks. We represent Dr. Dick Brown. We represent the Workmen's Compensation folks. This Company was a self-insurer, Workmen's Comp. When you look at these documets, and you'll have them back there — like Plaintiffs' Exhibit 203. Look at all these people. Folks that haul steel in here. Teague Hardware. Alabama Baron. United Lighting. All

these folks. These are the folks who, when this company was foreclosed on, and when these things happened that you've heard about happened, were cut off. I won't go into a lengthy discussion with you on the law. We agree with those theories Jere Beasley told you, but certainly we believe we're entitled to recover on the commercial reasonableness. We're entitled to recover on the fraud and conspiracy. Let me talk to you just briefly about the commercial reasonableness.

You remember I asked Mr. Herbert certain questions very carefully from down here at the end of the rail and I tried to get an answer to those things. I asked him about value of inventory. I don't know. Didn't try to find out. Just figured out what the bank was owed. Same answers on all the other assets of Parsons Steel. Why is it important? It's important because if there was equity on those assets, if those assets were worth more than the bank was owed, then these folks I represent and this Montgomery company, they were entitled to **[R-1574]** be paid. I asked Mr. Herbert, how did you all do that? Wasn't the net effect, Mr. Herbert, of forming this new corporation to shut off these unsecured creditors? You see, they could have avoided the expense of a new corporation if they just wanted to sell a going business. You heard that testimony over and over; we just wanted to sell a going business because you can get more for it. The bank got more for it. They cut off about a million dollars worth of debts; eight hundred and forty-six thousand. You form a new company and you leave all that behind. You form a shell corporation knowing that you're going to get these good assets, and the creditors when they wake up, you heard Sam Caufman. I represented the company, he told me. Nobody told me. I asked Mike Orange, and he said you'll have to ask somebody else. I asked Ed Herbert, and he said you weren't my lawyer. The bottom line is, they sent out a letter, a composition letter, to the creditors and said we're going to do something good for you. The bank's gonna cut the interest to six percent. We're goint to work this thing out. That letter goes out on the

21st, during the Christmas holidays. Nothing really happens. And then the first thing in January, January 5th, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. You think about it.

You don't leave your common sense at home when you come down here. Our jury system is wonderful because **[R-1575]** folks like you can come and think about it, and you can sift out of all of this stuff the truth. The truth is, no matter how you look at this evidence that came to you from the stand, the bankrupt corporation Parsons Steel Montgomery is entitled to recover in this case. It's entitled to recover on the commercial reasonableness because there was nothing reasonable about any aspect of the sale. There was only one bidder there. One person, one buyer. It was all pre-arranged. It was done in secret. It was done in a hidden fashion. It was done in hidden fashion, because first of all you've got a corporation that was formed especially for it, and didn't even have Orange's name on it. You think they didn't start trying to do this on January the 5th? It worked out just like it happened. You come up on the 19th, and we've got nothing left. The bank says, we're secured. We got Mike Orange. We got good management. We're without the debt. Sure, the company can do a lot better. It has done pretty well. Mr. Orange says he's reduced the debt from one point three to nine hundred thousand. He is still operating. He sold about six hundred thousand dollars worth of equipment and a lot of inventory. They could have paid these creditors if they had done it right. If they had done it right. They didn't do it right. They didn't do it right because they didn't want to fool with having to go through with a chapter XI. You heard me ask Bill Richardson, who is a nice man and banker for First Montgomery. Would it have been more difficult **[R-1576]** for the bank if they had gone into a Chapter XI, and he laughed. Do you remember that? He said, sure it would have been more difficult. We didn't want that. We wanted to avoid that. They wanted to avoid it because it only cost the unsecured creditors

and this Montgomery corporation. This was commercially unreasonable because they ignored the values of this property. They handled it quietly. They say Jim Parsons waived notice, but you notice on those letters they even changed the time from ten to two. They didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or 11th. They said, you heard me ask Mr. Herbert, if I come with the money, sure we would have sold it to you. How was I going to know about it? They didn't call Ed Hodge, and said, Mr. Hodge, do you want to buy it back? They didn't want to work it out. Every aspect of the sale was commercially unreasonable. There's not one piece of evidence that should suggest to you that it was a commercially reasonable sale. Mr. Herbert says, we did what we had a legal right to do. I suggest to you that they don't have a legal right to conduct this sale in a commercially unreasonable fashion and take what these creditors and this company was entitled to. They don't have alegal right to do that. The Judge is going to charge you on the law. They did something they didn't have a right to do. That's why we're here. That's why I asked you, when you look at the evidence, to return a verdict of commercially unreasonableness for the **[R-1577]** Trustee and for Parsons Steel Industries in Montgomery. I ask you to return a verdict with numbers like Mr. Beasley proposed. You've got some specific claims. The statement of affairs in here. You'll have all these documents. Look at Plaintiffs' Exhibit 203 and go through there. You'll see that we're owed some money, but that's not how you arrive at how much we are entitled to, based on the evidence you've heard. Look at those assets and you can get a value, whatever value you determine, from the evidence, they're entitled to, and you back out of that the nine hundred and seven thousand dollars the bank actually got. You've got a differential, and the Trustees are entitled to that.

I won't say a lot about fraud and conspiracy. I'll just tell you this. It would appear that somebody's not telling the truth. The Judge is going to charge you on the credibility of the witnesses.

You don't have to remember what you said to tell the truth. You've heard evidence from this stand; from time to time, folks didn't exactly tell the truth under oath, or at least they changed it. They shaded the truth, and they've had documents that say things that they really didn't, that they really couldn't truthfully say. You think about that. Do they have anything to hide? Why? They say the bank didn't get anything out of it. Sure the bank got something out of it. They avoided handling it right in bankruptcy, if that was where it would have wound up. It avoided all of these unsecured creditors and had a **[R-1578]** company with that much additional momentum going. It avoided all that. I don't know what Mr. Herbert got. I'm not suggesting he got anything. From this evidence, there was a reason for it. Two accountants — he has a major in accounting — and Mr. Orange looked at those balance sheets. Somehow, some way in December, they decided to do it differently. They said, we want good management. They had good management. They had Michael Orange. If you assume all of their statements are correct, he had the option agreement. Why didn't they just let him stay out there, run it, and sell off the inventory? They had that right. I suggest to you that there was a reason for taking this company over, from the evidence that you've heard.

I agree with Mr. Beasley that we need to send them a message. I don't say that with any attempt to be dramatic. The only way you can keep this kind of thing from happening to other people is hit these folks where it hurts. Tell them, don't do it any more. We ask you in this case to award punitive damages. We think that the facts justify it.

The Judge is going to tell you what the law is, and I think when you apply that law he gives you to these facts, the only verdict you can conscientously come back with is a verdict for the Trustees and the Plaintiffs in this case. Thank you.

THE COURT: Mr. Nachman?

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

_____
United States District Judge

OPINION

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered the Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parsons I] in the Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II, at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parsons II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plain-

[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefor related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commercial reasonableness claims — the factual basis for which is unclear on the present record — were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

tiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9'507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

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[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interest or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sale price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the complaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegations suggesting a violation of a resulting trust. Paragraph

27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to inspect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and others were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The Trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged presale activity can best be determined by the way that the Trustee's attorney processed them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained

from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh". [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale".

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael

Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertance, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiffs' claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers for the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt — in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the State court proceeding, the determination by the State court

that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initially having its own doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court, and the Trustee was privy to such litigation.

An Order will be entered in accordance with this Opinion.

DONE this 29th day of March, 1985.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ORDER

This cause is now before the Court on Defendant Trustee's motion for reconsideration filed herein April 2, 1985, and on Plaintiffs' objection thereto filed herein April 3, 1985.

Upon consideration of said motion, this Court is of the opinion that the motion is a reargument of what has already been argued and ruled on. In *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367 (11th Cir. 1984), the Court states the circumstances under which the Trustee should be allowed to pursue his claim in State Court:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. ***.
>
> "If, however, the UCC claim is based on alleged improprieties connected with the conductg of the foreclosure sale itself (separate and apart from any of the events leading up to the sale), under the facts of this case equity dictates that the Trustee be allowed to pursue this narrow claim in state court. ***." Id., at 977.

The Court went on to say:

> "If the UCC claim is found to be based *solely* on the actual handling of the foreclosure sale (method, time, place, manner, etc.), the injunction should be modified to allow the Trustee to pursue this claim. ***." Id., at 978 [emphasis added].

To comply with the guidelines of the Court of Appeals, the Trustee attempted to rephrase his claims so as to allege a defect in the sale rather than an agreement to promote a defective (commercially unreasonable) sale. Yet, each claim refers to an alleged plan, act or omission occurring before the sale:

1. There was only one prospective buyer notified of the private sale by the Bank.

2. No notice of a private sale was given to the attorney for Parsons Steel until one day after the sale occurred.

3. The only persons in attendance at the private sale were Michael Orange, his attorney and Ed Herbert, in his capacity as agent for the Bank.

4. No notification of the sale was placed in any industry or trade publication or any newspaper, magazine or publication of any sort.

5. No attempt was made by the Bank to contact any person or company in the industry or any unsecured creditor of Parsons Steel as to the date and time of the sale.

6. Only one bid was received by the Bank to purchase the assets of Parsons Steel.

7. Disposition of the Parsons Steel collateral was made at a private sale only two days after repossession by the Bank.

8. The location of the sale was at the private office of Edward Herbert instead of at a public place.

9. The only factor considered by the Bank in determining the sales price for the collateral and, in fact, the price that was paid, was the amount of indebtedness owed to the Bank by Parsons Steel at the time the sale was made.

10. While the actual value of the collateral was in excess of 2.5 million dollars, the Bank received only a little over $900,000.00 for the collateral.

All of these matters could have been litigated in the original proceeding in this Court and most of them were. The apparent reason why little was said about these matters in the first trial is that Parsons, a veteran of the steel business, had exhausted possibilities of liquidation of his business before he agreed to the method finally negotiated by the Bank with Orange. Parsons knew and the Trustee must have known that a commercially unreasonable sale could not have then been proved.

Accordingly, it is ORDERED by this Court that Defendant Trustee's motion for reconsideration filed herein April 2, 1985, is hereby denied.

DONE this 21st day of May, 1985.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant Tom McGregor*, as Trustee for Parsons Steel Industries, Inc., a Bankrupt, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the District Court denying Defendant's pursuit of his UCC claim (commercially unreasonable sale) in State Court, said Order dated May 21, 1985.

DONE this 28th day of May, 1985.

/s/ James Jerry Wood
Attorney for Defendant Tom
McGregor, Trustee for Parsons Steel
Industries, Inc., a Bankrupt

PORTIONS OF BANK HOLDING COMPANY ACT CASE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 79-249-N

PARSONS STEEL, INC., ET AL.,
Plaintiffs,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N.A.,
Defendant.

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendant's motion for summary judgment filed herein January 29, 1980, be, and the same is hereby, denied.

DONE this 30th day of May, 1980.

United States District Judge

OPINION

This cause is now before the Court on the Defendant's motion for summary judgment filed herein January 29, 1980. The motion is submitted on the pleadings, exhibits, affidavits, depositions and other materials on file with the Court, along with the briefs supplied the Court by counsel for the Plaintiffs and the Defendant. Oral argument on the motion was heard March 4, 1980.

Plaintiffs brought this cause against the Defendant, alleging a violation of a portion of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1972(1)(C), 1975, (hereinafter referred to as the BHCA). Section 1972(1)(C) provides, *inter alia:*

> "A *bank shall not in an manner* extend credit, lease or sell property of any kind, or furnish any service, or *fix* or vary *the consideration for any of the foregoing, on the condition* or requirement—*that the customer shall provide some* additional credit, property, or *service to such bank, other than those related to* and *usually provided in connection with a loan,* discount, deposit, or trust service;" (emphasis added).

Although many of the surrounding facts are vigorously contested by the Defendant, this Court must view the evidence submitted most favorably for the Plaintiffs on Defendant's motion for summary judgment. When so viewed, the evidence reveals that Plaintiffs, Jim D. Parsons and Melba Parsons, are the sole stockholders of Plaintiff, Parsons Steel, Inc., of Mobile, Alabama. In January, 1976, Parsons Steel purchased 140 shares of stock in a Montgomery, Alabama, corporation then named Standard Machine Corporation. Shortly thereafter, Jim Parsons was elected President of the Montgomery corporation. On June 30, 1976, the remaining stockholders of Standard Machine Corporation sold their interest in the corporation to Parsons Steel. Soon thereafter, the name of the Montgomery corporation was changed to Parsons Steel Industries, Inc. For the sake of clarification, this Court will refer to Parsons Steel, Inc., of Mobile as the "parent" and to Parsons Steel Industries, Inc., of Montgomery as the "subsidiary".

The subsidiary had been banking with the Defendant—then named The First National Bank of Montgomery—since 1957. The subsidiary, under the direction of Jim Parsons, continued to do business with the Defendant. During the course of these business dealings, the subsidiary borrowed large amounts of

money from the Defendant on several occasions in order to finance its steel fabricating and manufacturing business. In connection with loans made to the subsidiary, both Parsons executed absolute guaranty agreements. On many occasions, loans were made without the filling out of a formal application therefor.

The loan officer of the Defendant in charge of the subsidiary's account left the employ of the Defendant in November, 1978. Prior to his departure, Jim Parsons had requested that the Defendant make additional funds available to the subsidiary and had submitted financial statements in connection with that request. When the replacement loan officer assumed responsibility for the account, the outstanding loans to the subsidiary totalled over $1,000,000.00.

Jim Parsons began negotiating with the Defendant on "restructuring" the subsidiary's debt in order to make additional money available to the subsidiary so it could pay off a portion of its outstanding accounts payable. Discussions of the amount contemplated to be loaned ranged from $600,000.00 to $250,000.00, but no loan application had been filled out. On November 30, 1978, inventory was taken of the subsidiary's assets in order to determine the security available for new loans. The inventory revealed assets totalling over $3,000,000.00.

On December 12, 1978, a meeting was held between the new loan officer, Jim Parsons and June Neely, the subsidiary's bookkeeper. Parsons and Neely contend that, at that meeting, the loan officer told them that the Defendant would make no further loans to the subsidiary unless the management of the subsidiary and 55 percent of the stock of the subsidiary were transferred to Michael Orange, a customer of the Defendant. On December 14, 1978, Jim Parsons executed an agreement granting Orange full power and authority to manage the subsidiary and the option to purchase 55 percent of the stock of the subsidiary.

Subsequent to the execution of that agreement, the Defendant refused to make additional loans to the subsidiary. On January 17, 1979, Defendant foreclosed on the assets of the subsidiary. After the foreclosure sale, the Defendant transferred the assets of the subsidiary to a corporation formed by Orange and loaned the corporation the purchase money. Subsequently, the subsidiary was forced into involuntary bankruptcy, and Plaintiffs instituted this cause alleging jurisdiction and stating a cause of action under 12 U.S.C. § 1975.[1]

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[1] "§ 1975. Civil actions by persons injured; jurisdiction and venue; amount of recovery: Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

Defendant contends that the motion for summary judgment should be granted (1) because the Plaintiffs were not "customers" of the Defendant and, therefore, lack standing to sue; (2) because there was no "extension of credit" required for the operation of § 1972(1)(C); and (3) because the Defendant's insistence on a change of management to a third party was not a "tying" arrangement prohibited by § 1972(1)(C).

With regard to Defendant's first contention, this Court has been directed to the United States Court of Appeals for the Fifth Circuit's decision in *Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978), the only reported decision to date construing the meaning of the word "customer" as used in § 1972 of the BHCA. In *Swerdloff,* the plaintiffs were the two 100 percent stockholders of a corporation which had assigned its accounts receivable to the defendant bank as collateral for loans. The plaintiffs had also personally guaranteed the loans. Plaintiffs alleged that the defendant bank advised them at one

point that the bank would no longer honor the accounts receivable financing agreement unless the plaintiffs transferred 51 percent of their stock in the corporation to one of the bank's other customers. The district court granted the defendant bank's judgment on the pleadings on the theory that only the corporation was a "customer" of the defendant bank and that the plaintiffs, as sole stockholders in the corporation, lacked standing to assert claims under § 1972 because the individual plaintiffs maintained no account with the bank and were not parties to the financing agreement between the corporation and the bank. *Swerdloff v. Miami National Bank,* 408 F.Supp. 940 (S.D. Fla. 1976). The Fifth Circuit Court of Appeals reversed the district court, stating, *inter alia:*

> "The economic realities of ownership and control must be considered in determining who is a 'customer' within the meaning of this section if the purpose of the Act is to be accomplished. A great deal of important business is done through closely held corporations. To decide in favor of the bank here would mean that banks throughout the country could require all manner of anticompetitive practices of the stockholders of such corporations with impunity. The law cannot be unmindful of the fact that substantial credit to such corporations is generally extended because of the credit ratings of the stockholder guarantors, regardless of the credit-worthiness of the corporation itself.
>
> "In the absence of a statutory definition, it is reasonable to draw upon the ordinary meaning of a word. In common usage, a customer is one who has business dealings with another or who purchases a commodity or service. While the [plaintiffs] did not maintain an account with [the defendant bank], they did enter into a contract of guarantee on which they were liable. Such a transaction certainly constitutes a business dealing with a bank." 584 F.2d at 58.

Defendant would distinguish *Swerdloff* from the case *sub judice* on the ground that, in this cause, the Parsons are the 100 percent stockholders of the parent corporation which is the owner of the subsidiary which had an account with the Defendant, i.e., this cause presents a situation one step removed from the circumstances presented in Swerdloff. This Court finds such an argument unpersuasive for several reasons. First, unlike the plaintiffs in *Swerdloff,* it appears that Jim Parsons did maintain a personal loan account with the Defendant. Second, like the plaintiffs in *Swerdloff,* both the Parsons personally executed a guaranty of the subsidiary's indebtedness which the Fifth Circuit Court of Appeals has indicated constitutes "a business dealing with a bank". Finally, the dicta quoted above, which expresses the Fifth Circuit Court of Appeals' concern for immunizing banks from liability when dealing with the stockholders of corporations having accounts with the bank, leads this Court to believe that the differences noted between the circumstances of this cause and those of *Swerdloff* is not a valid distinction.

Defendant's second contention is basically that there was never any specific sum for a loan agreed upon, that no loan application was ever filled out on behalf of the subsidiary, that no loan was ever made, and that, therefore, there was no "extension of credit" or other service by the Defendant to the subsidiary. As support for this contention, Defendant relies on the case of *Clark v. United Bank of Denver National Association,* 480 F.2d 235 (10th Cir. 1973), in which the Court stated:

> "Also important in connection with this argument is the fact the complained about tying arrangement never became a part of a final agreement. It was only discussed and considered as a part of the negotiating process. In fact, in the extensive depositions the evidence is entirely lacking to show event that loan negotiation ever reaches the point of a formal written application for a loan by appellants. Nor is there any evidence of an oral agreement between the parties concerning even any phase of a loan

> agreement. In fact, there were only conversations had between appellants and officers of Holding Company concerning the possibility of a loan." *Id.*, at 238.

However, the "argument" referred to in the above passage was that the requirement, that the borrower place money on interest-free deposit with the lender as a condition on the making of a loan, was a tying arrangement and a per se violation of the Sherman Antitrust Act. The reference to the BHCA was completely dicta due to the fact that the plaintiffs in *Clark* had only alleged breach of fiduciary duty, fraud, unfair competition, breach of warranty and violations of the Securities Exchange Act of 1934 and of the Sherman and Clayton Antitrust Acts. *Id.*, at 237.

In this cause, this Court is not being asked to hold that the actions of the Defendant constituted a per se violation of the Sherman Act or even a per se violation of the BHCA. The question before this Court is whether there exists a material issue of fact as to whether the Defendant fixed the consideration for the extension of credit on the condition that the customer provide some additional property or service to the bank other than those usually provided in connection with a loan. See, 12 U.S.C. § 1972(1)(C). The Plaintiffs have submitted affidavits to the effect that an officer of the Defendant stated that the Defendant would make no further loans to the subsidiary unless the Parsons transferred control and majority ownership of the subsidiary to a customer of the Defendant. Further affidavits have been submitted to the effect that, if the allegations are true, the "condition" placed on the making of further loans was not a condition "usually provided in connection with a loan". It is further undisputed that, during the course of the subsidiary's business dealings with the bank, few, if any, formal loan applications were ever filled out. In light of that evidence, this Court cannot hold, as a matter of law, that the Defendant did not fix the consideration for an extension of credit on an allegedly prohibited banking practice. The statute seems to outlaw such fixing of consideration for a loan even if the loan is not made.

Defendant's third contention is that, even if the Defendant conditioned the extension of credit on the transfer of ownership and control to a customer of the bank, such a condition does not constitute a tying arrangement prohibited by the BHCA. In *Swerdloff,* the Fifth Circuit Court of Appeals recognized that the BHCA "is directed at tying arrangements involving banks". 584 F.2d at 58. The Court went on to state:

> "The [BHCA] arose out of the concern 'that there be adequate safeguards against the possibility of misuse of the economic power of a bank.' [1970] U.S. Code Cong. & Admin. News, p. 5535. The provisions were directed at those abuses that would 'lead to a lessening of competition or unfair competitive practices.' They were intended 'to affirm in statutory language the principles of fair competition.' While the provision was expressly designed not to interfere with 'the conduct of appropriate traditional banking practices,'
>
> "[t]he purpose of this provision is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire. *Id.*" *Id.*

The only evidence this Court can find in the language of § 1972(1)(C) that the provision is limited to prohibiting tying arrangements is the requirement that the bank force the customer to furnish "to the bank" property or service not related or usually provided in connection with a loan. Defendant has attempted to point out that, in most reported decisions concerning the BHCA, the alleged prohibited condition involved the customer's being required by the bank to either place an interest-free deposit with the bank, see *Clark,* supra, or to sell a substantial share of the customer's accounts receivable to the bank, see *Costner v. Blount National Bank,* 578 F.2d 1192 (6th Cir. 1978). Defendant contends in brief that the insistence on a change of management "would in no way have forced Sub-

sidiary to accept some additional product or service of Bank. Rather it was an attempt by Bank to protect an existing loan by improving management in a debtor company." Defendant's Brief at 7.

A somewhat similar argument was advanced in *Swerdloff*. In that case, the defendant bank allegedly required the transfer of 51 percent of the stock of the customer plaintiff to another customer of the bank as a condition for continuing financing of the customer. The defendant bank contended that the plaintiffs made no allegation that the plaintiffs had been required to furnish *the bank* with a service not usually provided in connection with a loan. The Fifth Circuit Court of Appeals rejected such an argument, stating:

> "In a statutory provision intended to prevent the misuse of the economic power of a bank, however, such a specific allegation at the pleading stage of the case is unnecessary. *It is sufficient to allege that the bank required a customer to do an act not related to nor usually provided in connection with a loan. That there is a benefit to the bank will be implied for pleading purposes.*
>
> "Support for this interpretation is found in the report of the Senate Banking and Currency Committee. The report speaks of a prohibition of the requirement of the provision of an unusual service by the customer to 'the bank, the bank holding company or its subsidiary or to a business operated by one or more of the persons controlling the bank * * *.' [1970] U.S. Code Cong. & Admin. News, p. 5535. *This language indicates a concern with substance rather than form. Where there is a requirement of unusual service, at least an indirect benefit to the bank will be inferred upon a motion for summary judgment.*
>
> "Thus, the complaint adequately alleged a tying arrangement whereby a 'customer' of Miami National was required to provide an illegal service 'to such bank' in violation of 12 U.S.C.A. § 1972." [emphasis added]

This Court is aware that the district court in *Swerdloff* had granted the defendant's motion for judgment on the pleadings and was not ruling on a motion for summary judgment as is the case here. However, the above-quoted language indicates that the Fifth Circuit Court of Appeals has interpreted § 1972 to mean that a violation could be established if the unusual condition results in actual benefit to the bank even though the unusual service or transfer of property required of the customer flows to a third party. The quoted language clearly shows that, on motion for summary judgment by the bank, the inference of benefit must be indulged against the moving party. Therefore, under the facts of this cause, where it is undisputed that Mr. Orange was a customer of the Defendant at the time it is alleged that the Defendant required the subsidiary to transfer control and ownership to him, this Court cannot say, as a matter of law, that the Defendant derived no substantial benefit from the alleged unusual loan requirement.

Based on the foregoing, this Court finds that there exist material issues of fact left to be resolved and that, therefore, summary judgment would be inappropriate.[2]

An Order will be entered in accordance with this Opinion.

DONE this 30th day of May, 1980.

United States District Judege

[2] The statements of fact contained in this Opinion are based almost entirely on the evidence submitted by the Plaintiffs in opposition to the motion for summary judgment and are vigorously contested by the Defendant. This Court herein expresses no opinion on the probative value or weight to be given any of the evidence submitted by either party at this stage of this proceeding.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS
Volume I

DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, February 18, 1980, commencing at 1:30 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
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555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS
Volume III

CONTINUATION OF THE DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Friday, March 7, 1980, commencing at 9:05 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE: (Not Present)

JAMES JERRY WOOD, Esquire
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555 South Perry Street
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Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
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8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendant, in the Conference Room of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, October 9, 1979, commencing at 10:15 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE DEFENDANT:

M. R. NACHMAN, JR., Esquire
ERIC BRUGGINCK, Esquire
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8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR MICHAEL ORANGE AND
OSI, INCORPORATED:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF MELBA PARSONS

DEPOSITION OF MELBA PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, February 18, 1980, commencing at 10:10 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
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Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF MICHAEL ORANGE

DEPOSITION OF MICHAEL ORANGE, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, January 22, 1980, commencing at 10:15 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
Attorney at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
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555 South Perry Street
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FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

DEPOSITION OF E. W. HODGE, taken pursuant to notice and stipulation on behalf of the Defendant in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, October 9, 1979, commencing at 9:08 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
Attorney at Law
300 South Hull
Montgomery, Alabama

FOR THE DEFENDANT:

M. R. NACHMAN, JR., Esquire
ERIC BRUGGINK, Esquire
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Montgomery, Alabama

FOR MICHAEL ORANGE and
OSI, INCORPORATED:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
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Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor, Parnell & Sforzini
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF LUTHER H. WALLER, JR.

DEPOSITION OF LUTHER H. WALLER, JR., taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 28, 1980, commencing at 2:05 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

CHARLES N. PARNELL, II, Esquire
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555 South Perry Street
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FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF SAMUEL KAUFMAN

DEPOSITION OF SAMUEL KAUFMAN, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 10:10 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF WILLIAM E. EPPERSON

DEPOSITION OF WILLIAM E. EPPERSON, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:00 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
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300 South Hull
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FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF WILLIAM M. JORDAN, JR.

DEPOSITION OF WILLIAM M. JORDAN, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 3:30 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
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300 South Hull
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FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JAMES S. GASKELL, JR.

DEPOSITION OF JAMES S. GASKELL, JR., taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 2:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
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FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF CHARLES M. HINES

DEPOSITION OF CHARLES M. HINES, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 3:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF THOMAS R. PEACOCK

DEPOSITION OF THOMAS R. PEACOCK, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
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FOR THE DEFENDANT — First Alabama Bank:

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8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF J. ALLEN REYNOLDS

DEPOSITION OF J. ALLEN REYNOLDS, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:50 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

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FOR THE DEFENDANT — First Alabama Bank:

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FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF PAUL E. NORRIS

DEPOSITION OF PAUL E. NORRIS, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:10 P.M.

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APPEARANCES

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EXCERPTS FROM TRANSCRIPT

Court's Opening Instructions to Jury

[2] THE COURT: Gentlemen, do you want the rules in this case?

MR. BEASLEY: Yes, sir.

THE COURT: Are your witnesses here?

MR. BEASLEY: Judge, we have placed the majority of our witnesses on call, so I don't believe there are any in the courtroom except Mr. Hodge.

THE COURT: All right. Let the witnesses who are here please stand to be sworn. (Witnesses sworn by the Clerk.)

THE COURT: If you will, show those witnesses where they can be comfortable, please, sir, other than representatives of the parties.

MR. NACHMAN: Your Honor, Mr. Herbert will be the bank's representative in the trial. I assume he can sit at counsel table?

THE COURT: Yes, sir. Let the jury please stand and hold up your right hand to be sworn or affirmed. (Jury sworn by the Clerk.)

THE COURT: Ladies and gentlemen of the jury, I realize that most of you have not had much experience in court and you come into court with some concern [3] about your ability to do justice to any case, if you have the sensetivity that many jurors have. I want to explain to you that there will be six of you who will eventually decide this case, and that the united brain of six people is nearly always very good. You will have a very substantial amount of time to talk about this before you finally decide it, and you will decide it after I have instructed you fully as to the law that may apply to the case. And in deciding what law applies to the case I will confer at length will all of the lawyers involved in the case.

You are sworn as jurors to apply the law that I instruct you to. If I make a mistake it is recorded here and it can be corrected by a reviewing court.

There are a number of things about this case that, perhaps, you will be less confused if I tell you about before we start. And when I tell you about the case I am going to deliberately overly [4] simplify it as best I can. The lawyers will have an opportunity at length to go into what they expect the evidence to show and what they think the law is in explaining the matters to you in their opening statement. But before they make opening statements I will tell you something of the case and something of law that you are sworn to abide by in deciding the case.

This case is a suit by Parsons Steel and Mr. and Mrs. Parsons, who are substantial owners in Parsons Steel, against the First Alabama Bank which was, as I recall it, then doing business as The First National Bank of Montgomery. The law that we are primarily concerned with which the bank is charged with having violated and the Parsons are contending that the bank did violate the law and that is the reason they have suffered substantial financial damage.

The law is that a bank shall not extend credit or fix or vary the consideration for the extension of credit on [5] a condition or requirement that the customer provide some service to such bank other than those related to and usually provided in connection with the loan service.

That is the law that applies to this case that the Plaintiff contends . . . or Plaintiffs contend that the bank violated, and they contend that because of that violation that they lost a substantial amount in the value of their property and money.

Now, they allege that the bank fixed the consideration for extending its credit based on the condition that it transfer the management of the Parsons Steel company — the company — to one of the bank's former customers, one Michael Orange,

and that this was a service to the bank by Parsons that was not usually provided and related to in connection with a loan made by the bank.

Now, the evidence will vary considerably as to precisely what happened between the parties involved in this [6] case; between the bank and Mr. Parsons, Parsons Steel Company and Michael Orange, in particular. As I understand the contention of the parties there will be evidence from which you may infer that Parsons Steel and possibly Mr. Parsons was in debt to the bank; that the debt was overdue; that Parsons Steel was seeking an extension of credit; that the bank was seeking payment of their obligation; that the management of Parsons Steel was assigned to Michael Orange, or largely assigned to Michael Orange, and that the bank allowed some additonal time for payment of the debt, or otherwise extended some credit based on a change of management, or something of the sort.

Now, after hearing possibly conflicting evidence about these and related matters you will be asked to determine whether the Plaintiff has proved to your reasonable satisfaction that, as a condition of an extension of credit, the bank required Parsons Steel or Mr. Parsons [7] to perform any service not related to and not usually provided in connection with a loan.

Now, as I have told you, it is your duty as jurors to follow the law as I have and shall state to you. And I will state some law before we start the trial and some law after the trial is started. You are not to single out one instruction to the exclusion of others, but try to give them all equal weight. You are not to be concerned with the wisdom of any rule of law, because that is up to the Congress. That is not up to me or to you. If I make a mistake about the law it is recorded and it can be corrected, hopefully. If you make a mistake about what the law is or what it ought to be and apply it, there is no way anybody can correct that, and it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given to you in the instructions of the court, just as it would also be a violation

of [8] law and of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

Now, for that reason and for some others I am going to ask you that when you are out the courtroom to avoid in every possible way gaining any knowledge about this case. It is a case that will take some weeks, perhaps, to try; certainly some days. It is a case that the news media may take some interest in. We never know for sure. But if you see or hear anything about the case either in the newspaper or on television or in radio or otherwise, avoid gaining any knowledge from it. It is impossible for you or for anybody to be sure where he got information about a case, and your decision under your sworn duty must be based on only evidence that came to you from the witness stand. Other evidence may not be dependable; there may be many other reasons why it should not be considered by you. It may be dependable

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Portion of Plaintiffs' Opening Argument

[24] This company in Mobile owned outright the company here in Montgomery. The name of it is Parsons Steel Industries, Incorporated; separate and apart from the Mobile company, it was another corporation.

This corporation here in Montgomery has been doing business with The First Alabama Bank for years. First, through a Mr. Hodge, who will testify here today, and Mr. Howard, and then ultimately by the Parsons who bought them out. This had been an ongoing relationship for many, many years; a good relationship between the parties.

We expect the evidence to show that this relationship went on for this period of time under, basically, a loan officer by the name of Mr. Richardson, who will also testify in this case. He was the loan officer of The First Alabama Bank.

Now, when I say Parsons Steel Industries, Inc., — and I will refer to them as the Montgomery corporation or the Montgomery company—they were in business . . . steel business, really. **[25]** And that will be adequately explained to you. They fabricated and also sold and built metal buildings; steel buildings. It was a massive operation located here in Montgomery. It employed, ultimately, some one hundred people out there.

Now, let me just specifically tell you what happened as we understand it. Early in 1978 Mr. Parsons was negotiating with Mr. Richardson to extend the loans that had been made by Parsons Steel. The debt at that time was some one million dollars owed by the Montgomery corporation to the bank. It was secured by the assets of the company. It was also secured by land owned by the Mobile company, which was also located . . . on which the Montgomery company was actually physically located. And in addition to that, Mr. and Mrs. Parsons had individually, personally guaranteed the debt to the bank. In addition to that, the Mobile corporation had, up to a limit, I believe, of two hundred thousand dollars, guaranteed a portion of the debt.

[26] Early in '78 Mr. Parsons and his business manager at the time Mr. Whitehead met with Mr. Richardson the loan officer at the bank and told him that they wanted to extend their loans; put them on a long-term basis so that they would actually be a better loan for both the customer and the bank, and that they would need some additional captial because of the new phase of the business; they were changing over. He told them they would have a cash flow problem during the year '78. Mr. Richardson understood it. The relationship was good.

This rocked on during the year '78 until the point in time when Mr. Richardson was leaving the bank. Now, we expect the evidence to show clearly, without any doubt, that up until this time there was no dispute by the bank as to this being a good loan, as to the Parsons being good customers. In fact, we

want you to look very closely at the bank records, and you will find that even in August of 1978 **[27]** the bank did a routine review of this loan and said that this, in effect, is a good loan; didn't list any deficiencies with the exception of one which has absolutely nothing to do with this case. And this was done by an employee of the bank who was not the regular loan officer, to give them some independent objectivity to make sure the loan officer was doing his job.

Now remember this date, August of 1978. They had been negotiating the loan and the restructuring, and so forth, up to that point. Mr. Richardson was leaving. So, later, between then and November; Mr. Richardson was leaving the bank and he turned over the loan to Mr. Herbert, who is sitting here at counsel table in the blue suit on the far end over there with his lawyers. Mr. Herbert comes into the picture, and just about the same time another third party comes into the picture.

Now, remember this name, also. It is going to be real important in your deliberations. This other name was **[28]** Michael Orange; Michael Orange. Who had been a very good customer of the First Alabama Bank who was on a personal basis with the president of the bank. In fact, the president had been looking for a business for Mr. Orange to buy to go back into business here in Montgomery. And this had been a relationship between First Alabama Bank, Defendant, and this Mr. Michael Orange.

Mr. Herbert comes in and the negotiations continue. And, remember, Parsons had been owing this money—a million dollars is a lof of money, but this was a big business, also, with a great deal going on out there, and it was a good customer of the bank. Mr. Herbert comes into the picture and he tells Mr. Parsons, "I want you to bring in financial information; we are negotiating the loan, the restructuring, putting it on a long-term basis with a definite payout, additional captial funds for the various things that you use capital money for.

So, this was, say, in the latter [29] part of November. Say, November the 30th the statement was made, the inventory was taken.

In the meantime, there was some talk of a sale to an out-of-state company of the Montgomery company. Mr. Herbert says to Mr. Parsons, "Don't sell to them. We prefer to do business with local folks." And Mr. Parsons says, "Fine." He continues to negotiate.

Remember this date—and I hate to keep throwing dates at you, but this is important. In the bank's records of November . . . rather, December 6th of 1978, in the bank's own records is a statement by Mr. Paul Norris, and here is what it says: We are presently negotiating with Jim Parsons the restructuring of the Parsons Montgomery company's debt. That is in December of 1978.

Now, Mr. Parsons brings the information in and here is what Mr. Herbert says: "No more money. We are not going to step further with you unless you bring Mr. Michael Orange in as manager of your business." [30] As president, if you will. "And also give him a majority position of the ownership of your stock, and then you can get all the money you want", in effect. Mr. Parsons had a hundred folks out there working for him and had an ongoing business. It shocked him. He agreed to it; had no choice.

And this is the econompic power we are talking about. He became dependent, that business was dependent on that bank, you see, when that condition was placed. Just as the Judge has told you, the condition is that you can not place something on a customer that is not a usual banking practice as a condition or a requirement for the extension of credit. And that is exactly what we have in this case.

Now, then is when the strange things started happening. Mr. Parsons and Mr. Orange, the new president—and by the way he

received 55 percent of the stock...option to purchase 55 percent of the stock for one hundred dollars—was made president and chief executive officer **[31]** of the company and signed a document with Mr. Parsons to that effect. Then they go to a local lawyer, another lawyer, a friend who had known Mr. Orange prior, Mr. Luther Waller. He fixed up these papers and then they went to another lawyer in the same firm and they sent a letter out to the creditors of the company. And you will hear all of the testimony about this. This was on the 21st of December.

Now, from the 21st of December—remember, we have got Christmas coming up; the holidays—since the 21st of December up until, say, the 5th of January, the creditors, the other creditors, the trade creditors, are being notified. There was a substantial debt to outside folks in any business...in this business.

So, January 5th Mr. Herbert for the bank put into operation a plan that Mr. Jimmy Gaskell will testify to you had been devised by the board of directors of this bank. And this plan was this: That we will send a letter out to the creditors—**[32]** we will call it the Kaufman plan. The lawyer was Sam Kaufman—we will send a letter out to the creditors of this company and more or less give them some information on the company and hope they accept it and then everything will be fine.

But there was a contingency plan in the wings. And here is the contingency plan: That if this plan doesn't fly then we will sell the business on a private sale to Michael Orange, the man who had been placed in the business by the bank, the friend of the bank, the customer of the bank who had gone in and gained the confidence, I assume, of Mr. Parsons, and became his president, and, really, own the company, you might say; on an option to purchase it. And this is the man who winds up with the business. Winds up with the business. And here is the way it happened: On the 8th day of January, just days after the com-

position letter went out, and the deadline for the creditors to accept it was the 15th of [33] January—remember that date.

On the 8th day of January the bank calls the Parsons loans; calls it. You have to pay it, and gave them notice.

Now, from that point forward, from the 8th to the 17th, it was all over. And here is the strange thing. And this will be testimony that will be given to you. Mr. Orange creates a new company, a privately owned corporation that he and his family owned, and I assume still do. The bank loaned them, quietly, 1.3 million dollars, I believe, was the amount. 1.3 million dollars. That was on the 12th day of January. Mr. Orange didn't have to put a dime into it; not a dime. That 1.3 million was, in effect, unsecured. In fact, Mr. Orange didn't even sign the note. He just had a new corporation, a thousand dollars capitalization and he borrowed from that bank 1.3 million.

Then on the 17th day of that same month he buys at a private sale all the assets of Parsons Steel. Parsons loses his business, loses his land—and that [34] is land of considerable value which was pledged to buy the Mobile corporation for that debt—loses the value of his stock, loses his business and they have to go bankrupt.

So, that, basically, is what the testimony will be. I haven't gone into all of it, but it is really complicated. And perhaps I have confused more than I have helped you. But I have tried to give a brief outline of what happened and how the bank in this case has abused, grossly abused its economic powers over its customer.

And we believe that after you have heard the evidence that you will be satisfied that the bank brought Mr. Michael Orange in, portrayed him as a potential purchaser of that business for a fair price, in the beginning, and then the true colors came out. And we find Mr. Orange placed there, an insider for the bank, so that he could gain the information required to buy it, in effect, for nothing. For nothing.

Our clients have lost, they have been [35] damaged. The bank and Michael Orange have gained. And we submit to you that after you hear the evidence, without question, that your verdict will be for the Plaintiffs in this case.

I thank you.

* * *

Portion of Defendant's Opening Statements

[37] the evidence to show that Mr. Parsons stated falsely about this matter in order to get bank credit. He said he owned 98 shares of the business. He didn't. His wife owned 98 shares of the Mobile company. He owned one and a third party named Gaston owned the other.

No, the act that we are concerned with here, the act of Congress, is what is called an antitrust type statute. Now, the antitrust laws for most businesses were passed many years ago, back at the latter part of the last century, in the 1890's. And, essentially, what those laws were designed to do was to protect free competition so that free enterprise and free competition, which we feel in America is the best kind of economy to have, could prosper and that companies couldn't combine with each other to set prices to put other companies out of business, and to do other practices, among them, practices called tying arrangements. And this gets to the statute we are talking about regarding banks.

[38] Tying arrangements, as the Court, I am sure, will charge you more fully at the conclusion of this case, is a situation where a business says, we won't sell you this product unless you agree to buy some other product from us, too. And because, when companies with economic power exercise that kind of tying arrangements it meant that competition between the tying products was not as free as it might be. And that would mean that prices might be artifically fixed on the rest of it.

Now, in 1972 Congress said to banks, you cannot engage in tying arrangements. You can't, as for example, tell an automobile dealer, "We will lend you so much money providing you, Mr. Automobile Dealer, will discount all your automobile papers at our bank." Or a banker couldn't say, "We will lend you some money on some real estate provided you use X or Y real estate agent and nobody else as your agent." Provided, also, that the real estate agent was a customer of the bank.

Now, that is the kind of practice **[39]** that we are talking about here. That is the only kind of legal violation that is alleged here. We respectfully submit that Mr. Beasley is in error when he stated to you a few minutes ago that the purpose of that act was to prevent the bank from using its economic power to have a customer do something that was not in his best interest. You will search the statute in vain for any such purpose as that. The purpose was and is to prevent the use of this tying power. And Congress was very careful in making plain that it was not talking about the usual kind, the traditional kind, the sound of banking practice which is necessary to secure a loan; a mortgage, for example; a personal guarantee where a small closely held corporation was involved. And we submit that we will show to you that among the practices that are absolutely essential and they are reasonable is if somebody is lending money to a business and the business is being run into the ground and improperly managed and if as a result of that the **[40]** company isn't able to pay its trade creditors or the bank when the bank has a loan and trade creditors are extending credit to the steel

companies so it can get steel to manufacture and sell its product. Then if that business wants some more money or if it is in default on loans that are already outstanding and it says, "Don't foreclose on these loans", or it says to the trade creditors, "Don't try to get your steel back", it is perfectly sound, usual practice for a bank or any other creditor to say, "Look. We are not satisfied with the way this company is being run. You owe us a good bit of money. You aren't paying the money. You aren't paying the interest on the money and we are not going to lend you anymore money because we think this company is improperly managed. If you get some new management in and we have confidence in the new management then we will lend you some more money." And that is all this case is about, ladies and gentlemen.

I will now trace a little bit of the **[41]** facts and background. And you will see that they are in pretty sharp contrast to what Mr. Beasley has told you. Of course, the Court has already told you that what he says and what I say, that is not evidence in the case, and you will judge the case as it develops based on the evidence that comes from that stand. But let me tell you what we expect to show.

We expect to show that sometime beginning in 1978 that contrary to there being any sort of renegotiation for any further loans, that because of practices which we say are deluding and self-serving and diverting money from that company and property from that company for this man's personal use rather than to his creditors and to pay off his loans —

MR. BEASLEY: Your Honor, we object.

THE COURT: Overruled.

MR. NACHMAN: That that loan got into serious trouble. And that in conferences with Mr. Richardson who at that time was with First Alabama Bank — and he will testify —

* * *

Portion of the Testimony of Edmond W. Hodge

[72] A. Yes. It was considerably.

Q. Did you have an opportunity to go out to the plant site from the time you sold the business up until, say, December of 1978? A. Yes.

Q. How often would you go out there? A. Roughly, once a month.

Q. And while you were there would you make any spot checks on inventory, or look around the place? A. Yes. I would walk through the warehouse and through the plant.

Q. At anytime did you see any accumulation of scrap that, in your opinion, would be worthless or — A. No. Not more so than is normal in the business. You always generate some scrap but, normally, that is sold to some local scrap dealer and it is moved out periodically.

Q. Then what you saw was the usable inventory? A. Yes, sir.

Q. And that was continuously throughout that period? A. That is correct.

Q. Would you tell the Court and jury approximately how many metal buildings were located on the some 20 acres that made up the Parsons Steel Industry operation there? [73] A. Well, there were actually three buildings, separate buildings. The main plant area consisted of four bays.

Q. Four bays? A. Right.

Q. What is a bay? A. A bay . . . this room would be considered a bay if you put another room next to it and stacked them up.

Q. And what would happen in these bays? A. That was the manufacturing.

Q. The manufacturing process? A. Right. The machinery was in there and the employees worked in there.

Q. Would you tell some of the types of equipment that would be used in this manufacturing business? A. Well, shers, decoilers, press brakes, drill presses, punch presses.

Q. Would these be small or massive pieces of equipment? A. They are large pieces of equipment.

Q. Was the equipment and the physical plant itself in reasonably good shape, as far as you know? A. Yes, sir. Very good shape.

Q. Very good shape? A. Right.

Q. Did you have any financial interest in the business

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[82] the situation that I described to you would be a normal or ususal banking practice? A. The only thing I can say is that I have never heard of it.

Q. You have never heard of it? A. No.

Q. And you have been in business for how long? A. Since 1948.

Q. All right. During the fall of 1978 did you have any knowledge from any source whatsoever that Mr. Parsons was negotiating with First Alabama Bank for additional funds? A. No.

Q. You never had any discussion with Mr. Herbert or anyone concerned with that? A. No.

Q. And I believe you testified that you had been out on the premises of the Parsons operations here in Montgomery on numerous occasions? A. That is correct.

Q. Would you have also been out there during the period of time, say, October, November, 1978? A. Yes, sir. That is correct.

Q. Would you have had an opportunity to observe the inventories on hand at that time? **[83]** A. Yes.

Q. And how would you describe them at that point in time? A. They were large.

Q. Large? A. Too large, I think. Yes.

Q. Would they have a value? A. Yes. I would think they would have a value.

Q. Would any of it been considered scrap, other than in small amounts? A. None that I saw.

Q. In other words, it would have had whatever the market value was at that time? A. That is correct.

Q. And I believe you stated that you thought the inventory was, perhaps, too large? A. Yes, sir.

Q. Would any part of the inventory have been steel that could have been sold on the market? A. No. Not at a price.

MR. NACHMAN: I didn't understand that answer. A. It could have been sold at a price.

Q. (Mr. Beasley continues) Would that price have been whatever the market was at that time? A. Yes. That is correct.

[84] Q. Not for scrap purposes? A. No.

Q. Or not for distressed sale purposes? A. No.

Q. What is a distressed sale? A. A distressed sale, in my opinion, would be a sale that was forced and in which you would have to take below market value.

Q. But this was steel that could have been sold on the market without any difficulty, then, in your opinion? A. Yes.

THE COURT: Mr. Beasley, I am going to let you call the next recess anytime you think we ought to have one.

MR. BEASLEY: I have one or two more questions, and I will be through with this witness.

THE COURT: All right.

Q. (Mr. Beasley continues) Mr. Hodge, have you, to this date, received your guaranty back from the First Alabama Bank? A. No.

Q. Have not? A. No, I have not.

Q. Have they contacted you about it? A. Not at all.

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Portion of Testimony of Jimmy Douglas Parsons

[284] MR. BEASLEY: We offer Plaintiff's Exhibit 36.

THE COURT: It is admitted.

Q. Mr. Parsons, would you briefly describe the nature of the actual plant site itself; the land, the buildings, the type of equipment that would be inside those buildings? A. Well, the area covers about twenty-five acres, more or less. The buildings are approximately a hundred square feet. They are very wide and very long and very high, and the equipment is contained within the buildings. We have some very large pieces of equipment and some average size. But it a very large industrial plant.

Q. The coils that Mr. Hines described this morning, which weigh some five tons — A. Yes, sir.

Q. — of your knowledge, what would be the largest number of coils that you would have had in inventory at any one time? A. We have two types of coils and I will give you a total of both, if you like. You have painted coils and then you have unpainted coils. So —

Q. Explain to the Jury exactly the difference in a painted coil and unpainted coil, what it is used **[285]** for, and its value and so forth? A. Well, a painted coil is a pre-painted baked on material . . . like an automobile finish, but it comes from a steel mill. And it is a special process that will allow you to fabricate that, to some degree, after it is painted, such as making siding for buildings or roofs for buildings; you can acutally make that product after it is painted. So, that is what it is; it is a pre-painted material. But it is used primarily for buildings, for roofing and siding and trim.

Unpainted coils, on the other hand, range from the very thin type that is used in basic sheet metal applications, manufacturing, maybe, a typewriter or a calculator — it is something of that type, just for identification — up to pieces of material three-eights of an inch thick which you would use in the structural part of, maybe, a farm implement or structural columns for some buildings; that type.

So, there is a big difference between the two. The painted material is very expensive material. The unpainted material is moderately priced.

Q. How many painted coils have you had on hand at any **[286]** one given time; the largest number that you can recall, in your best judgment? A. As many as a hundred.

Q. And what would be the approximate value, say, if you can, give me a date when you could pick a value to place on those coils? A. Well, considering that they weigh about five tons — ten thousand pounds each — then you have five hundred tons, and it sells for thirty-three cents . . . slightly over thirty-three cents, the cheapest that we ever bought, so that is . . .

Q. What about the unpainted coils? A. The unpainted coils, we wouldn't have as many in numbers, probably, at any given time, not more than thirty-five to fifty. But weight-wise, generally they were more. They were, like, seven and a half to

eight tons. Sometimes they got very heavy and they were really hard to handle. We tried to limit it to twelve thousand pounds, but the steel mills were always making them heavier.

Q. At any time during the year 1977, did you have any coils on hand that could not be used or had no market value? A. Well, I am sure there was an occasion during 1978 that we might have had one or two coils that came

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[288] Q. Let's go back to January of 1978, the meeting with Mr. Richardson. Can you tell the Jury from that point forward if Mr. Richardson ever at any time told you that...refused to make any additional loans to Parsons Steel? A. Mr. Richardson never refused to make a loan to Parsons Steel. Late in 1978 he put some stipulation on it, but he never refused to make a loan to Parsons Steel.

Q. What type stipulation did he place on the loan? A. In either September or October of 1978, I had an option to either give a second mortgage on my residence, my home, or have a capital input into the business of a hundred thousand dollars.

Q. Did you agree to give the second mortgage on your house? A. No, sir.

Q. Did you refuse to do it? A. Yes, sir. I was insulted.

Q. What about the second alternative, the transfer of a hundred thousand dollars in additional funds into the company? A. Yes, sir. We agreed to do that.

Q. You agreed with Mr. Richardson? A. Yes. I agreed that I would do that.

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[293] MR. BEASLEY: We will offer Plaintiffs' Exhibit 14.

THE COURT: It is admitted.

Q. (Mr. Beasley continues) Did you sign a personal guaranty in connection with that note, also? A. Yes, sir, I did.

Q. All right. Did Mr. Richardson voice any concern at the time you made these two notes, the last one being in October of 1978, to you? A. No, sir. Not concern.

Q. Any reservations about making the loans? A. No, sir. At this particular time, we were right in the midst of negotiating a different loan, so he wasn't...

Q. Would you tell the Jury exactly what the negotiations were between you and First Alabama Bank at this particular time that you just referred to? A. In October?

Q. October of '78? A. Mr. Richardson and I had been talking, certainly, in the last month or so prior to this about renewing a long-term note, that we had had for a couple of years. The note was a half a million dollar note, and it had been paid down to about a quarter of a million dollars, maybe slightly less than that,

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[305] ... Q. Never at any time? A. No, sir.

Q. Did Mr. Herbert at any time prior to Mr. Richardson leaving the bank ever tell you that the bank would extend no further credit? A. No, sir.

Q. At that time, were the loans that you have discussed, the notes that were renewed as late as October of 1978, were they due and payable at that time? A. In December?

Q. Yes, sir. A. Some were coming due and some were due.

Q. And at that time, if I understood your previous testimony, you were negotiating with the bank for long-term financing and additional funds? Is that correct? A. Yes, sir. That is right.

Q. And that would be with Mr. Richardson and then with the next man who took over, Mr. Herbert? A. Yes, sir. That is correct.

Q. Mr. Parsons, did Mr. Herbert at any time place any special conditions or requirements on you as the loan customer as a condition or requirment to **[306]** extending that credit? A. In a meeting with Mr. Herbert on December the 12th, the requirement of accepting Mr. Orange, Mike Orange, as manager and principal owner of the business was placed, if we were to receive any additional financing.

Q. And that was done by Mr. Ed Herbert? A. Yes, sir.

Q. Had you at any time ever been aware of the fact that this bank was going to place this requirement on you? A. No, sir. Not at all.

Q. Had you at any time had any dealings with Mr. Michael Orange prior to this date? A. On...Well, when you say dealings? No, sir. Never had any dealings with him.

Q. Had he at any time been out to your place of business prior to this? A. Yes, sir. Visited the plant once.

Q. And what was the reason for that visit? A. He came to look the plant over as a prospective buyer at the request of Mr. Herbert.

Q. How did that information come to you; that he wanted to look it over as a prospective buyer? A. Mr. Herbert called me and asked me were we still interested in selling the plant, and I told him, no.

* * *

[309] Q. At whose request? A. A combination of two. We were in the midst of negotiating with the bank on the restructuring of the existing debts and borrowing some additional money. And, Mr. Herbert asked as a part of the November statement to have

a physical inventory of the assets; of the material; actual inventory of the steel that we used.

And Ajax Atlas, of course, the buying of the business, coincided with that. So they came down and also monitored it. But it was a combination...The reason was a combination of the two.

Q. When was this carried out; the actual physical inventory? A. Thanksgiving week of November, which would be, I thing, the very last week of November.

Q. How long did it take, if you recall? A. The physical counting of it took the better part of a week for...I am going to guess, about twenty-five people. Not less than twenty and probably no more than twenty-five.

Q. Were any people outside of your immediate employees involved in this inventory? A. You mean the actual counting of it?

Q. Actually participated in the counting or verifying?

* * *

[316] Q. Of 1978? A. Yes, sir.

Q. Now, did Mr. Herbert, on behalf of the bank, tell you that if you took Mr. Orange in as he proposed, that additional funds would be available to the company? A. Yes, sir, he did.

Q. What exactly, did he tell yoiu? A. He told us that if we accepted Mike Orange as a principal in the business, he would make available any amount of money that the company needed.

Q. And this was conditioned on Mr. Orange's presence in the business? A. Yes, sir. That is right.

Q. All right. Had you made an offer to sell the business to the company. Ajax Atlas, the out-of-state company, that you testified about yesterday? A. Yes, sir, we did.

Q. What was the proposed sales price that you made to them? A. In the final analysis, it would have been approximately one point five million dollars.

Q. All right. What would they have received had they accepted that offer? A. They would have purchased all the assets of the business

* * *

[331] was my meaning.

Q. Had there been any adjustments in the inventory figures, to your knowledge, prior to this letter going out? A. Enormous adjustments. Yes, sir.

Q. Which direction? A. Downward.

Q. By whom? A. Mr. Orange.

Q. Did Mr. Orange have any knowledge of the steel business, to your knowledge? A. No to my knowledge.

Q. Did he appear to know anything about the price of steel or types of steel, or what gauge would be involved, or . . . for example, what a coil would have been? A. He told me he knew nothing about it at all.

Q. And he was the gentleman who adjusted downward the inventory figures? A. Yes, sir. That is right.

Q. And these would have been the coils that Mr. Hodge testified to that he observed during the month of December, and I believe he described the types of coil and the weights of those coils?

And you stated the value of them, I beleive, in your direct testimony yesterday?

[332] Q. Now, let me ask you this question: Mr. Parsons, if you had known in September or October of 1978 that the bank was going to refuse to give you additional funds in the form of a loan, could you have sold enough inventory to ease your cash flow problem?

MR. NACHMAN: We object to that, Your Honor.

THE COURT: Restate the question, please, sir.

Q. (Mr. Beasley continues) Mr. Parsons, had you known during the month of September —

THE COURT: I will sustain the objection.

Q. (Mr. Beasley continues) Mr. Parsons, did the inventory . . . amount of inventory, decline at any time substantially from the month of, say, September up until the month of December? A. No, sir. Not at all.

THE COURT: Not what? A. Not at all.

Q. (Mr. Beasley continues) What was your role in the company during the period of time, December 21, 1978 through, say, January 5 of 1979? A. My role?

Q. Your role? A. Mr. Orange was primarily preoccupied with this letter. And, so, I was expected to —

[333] MR. NACHMAN: Your Honor, we object to that. That is not responsive.

THE COURT: I sustain that. You have to answer his question. A. Yes, sir.

THE COURT: Not go into something else. A. Yes, sir. I was charged with the daily operations of the plant.

Q. (Mr. Beasley continues) Did you have anything to do with the management of the company during this period? A. No, sir. I mean, as far as running the plant, yes, sir. But as far as management decisions concerning the company, none.

Q. All right. When was the first date on which you learned that the bank had a foreclosure in their mind, or that they were planning foreclosure?

MR. NACHMAN: We object to that, Your Honor.

MR. BEASLEY: I will rephrase the question.

THE COURT: What —

MR. NACHMAN: He is asking about the undisclosed mental operations of the bank.

[334] THE COURT: I think he asked when he first became knowledgeable of the foreclosure. Isn't that what he was asking him?

MR. NACHMAN: No, sir. He asked him when the bank had it in mind.

MR. BEASLEY: I will rephrase the question if there is any question about it.

Q. (Mr. Beasley continues) Mr. Parsons, when did you first learn that the bank was going to foreclose on Parsons Steel? A. I think it was January 8, 1979.

Q. How did you learn this? A. I visited Ed Herbert in his office.

Q. What did he say to you on that date? A. He said, "If you are not going to go along with it any more, we are going to close it down."

Q. Close it down? A. Yes, sir. We are going to foreclose.

Q. And that was on the 8th day of January of 1979? A. Yes, sir, as I recall.

Q. Had there been any mention to you at any time prior to that date by any person with the bank that they were going to foreclose? A. No, sir . . . Well, yes, sir. At one time there was

an argument between Mr. Richardson and myself, in **[335]** September, I think, and he said if I was not willing to give my house . . . a second mortgage on my home, that he would foreclose. And I said, "Fine. Here are the keys. If this is what we call our friendly foreclosure." But we got over the argument and it was never mentioned again.

Q. Was that a personal argument between you and Mr. Richardson? A. Yes, sir; personality conflict of the moment.

Q. I assume you took offense because he wanted a second mortgage on your house at that time? A. Yes, sir. I was upset.

Q. Is that when the alternative plan was propsed; the influx of funds into the company? To shore up the cash flow? A. Yes, sir. It was an alternative that we both agreed on.

Q. And that was satisfactory to Mr. Richardson? A. Yes, it was.

Q. Was there enough inventory on hand in January of 1979 to have paid off the problem areas of your company's debts had you had the opportunity to do it? A. In '79?

Q. January of 1979? A. Yes, sir.

[336] Q. Now, what type sale would this have required to achieve the result it would have to be; to pay off these debts? A. What type of sale?

Q. Yes. A. The material would have had to have been offered to people in a like business; people in the steel business who would use the material. It would be an open market item, but certainly limited to the people who used it.

Q. Would these have been items that other persons in the steel business could have used in their business? A. Oh, yes, sir, all of it.

Q. Then Mr. Hodge was correct when he said that just about every . . . excuse me.

MR. NACHMAN: I just wanted to object when you finish the question.

MR. BEASLEY: Well, I hadn't asked a question.

MR. NACHMAN: I understand.

Q. (Mr. Beasley continues) Was the inventory on hand marketable in January of 1979? A. Yes, sir.

Q. And this would have been . . . any person who had visited the plant with a knowledge of steel, could **[337]** have seen that. Is correct? A. Yes, sir.

MR. NACHMAN: We object to that, Your Honor; what any person could have seen who was knowledgeable in steel.

THE COURT: I can't hear you, Mr. Nachman.

MR. NACHMAN: The question is what any person could have seen who was knowledgeable with steel. And we think that is a highly speculative question and we object to it.

THE COURT: I will sustain it.

Q. (Mr. Beasley continues) Had Mr. Orange made any attempt to get out of his role with Parsons Steel Industries along about this time in January of 1979? A. Yes, sir. In . . . After my meeting with Mr. Herbert, Mr. Orange —

THE COURT: Which meeting? A. January the 8th meeting.

Mr. Orange wanted to resign as the chief executive officer of the company.

Q. (Mr. Beasley continues) Did you report back to Mr. Orange that the bank had foreclosure in store for the company? A. Yes, sir.

* * *

[363] A. He was still in charge.

Q. Weren't you the president of the company after he resigned? A. I don't think that has ever been answered for sure. I wasn't in charge. No, sir.

Q. Well, who was in charge after Mr. Orange resigned? A. Mr. Orange.

Q. He continued to operate the business? A. Yes, sir.

Q. Did you ever suggest to him that all the inventory be liquidated to pay off the bank and avoid foreclosure? A. Yes, sir.

Q. You suggested that to him? A. Yes, sir.

Q. And you suggested it to the bank? A. Yes, sir.

Q. You told the bank that you could liquidate these inventories and pay off its obligations and that Mr. Orange wouldn't let you do it? A. No, sir.

Q. I didn't think you did. A. But I told the bank way before Mr. Orange came into the picture that —

Q. That is not my question, Mr. Parsons. My question [364] is: When you had this conversation with Mr. Herbert on January the 8th, 1979, about foreclosure, did you tell him that there was ample inventories to pay off the obligations to the bank and that you were unable to do so because Mr. Orange wouldn't let you? A. No, sir. I didn't tell him that on that day.

Q. Now, am I not correct — going back to September of 1978 now — that Mr. Richardson, who was then the bank person who was in charge of your loans, made it plain to you that there would be no further extension of credit to the Montgomery Parsons? A. You are not correct.

Q. He never made that plain to you? A. No, sir. He did not say that at all.

Q. Did he tell you that there would be further extensions of credit? A. Yes, he did.

Q. In what amount? A. We were going to renew a long-term note from approximately two hundred eighty thousand dollars to three hundred thousand, from that amount to six hundred thousand. Which would have given us as least a quarter of a million dollars in net money.

Q. But those were existing loans, weren't they, that had gone on for some time before and had been

* * *

[367] dollars or not that the bank was committed to lend you? A. We did not know the exact dollar amount of the proceeds we would get from the renewal of the note, but we both understood it would be approximately a quarter of a million dollars.

Q. And what rate of interest? A. I don't recall the interest rate. I think it was prime plus one and a half or two.

Q. And what was the term of the loan to be? A. As I recall, it was to be set up on five years but the payments were to be as though it was on a twenty year . . . or ten year. I don't recall the exact terms. But, basically, the same as it was.

Q. And when was that done? When did you and Mr. Richardson reach that agreement? A. In September.

Q. Of 1978? A. Yes, sir. That is right.

Q. Now, I am not talking about the agreement to extend the existing notes. Now, do you understand the difference? A. Yes, sir.

Q. All right. Did you ever pursue that with Mr. Richardson after September?

* * *

[380] is. Is that meeting the one I asked you the several questions about? A. Yes, sir.

Q. Now, before that time, as I understand what you are now saying, Mr. Herbert told you about Mr. Orange's interest... possible interest in purchasing. That was before you had these loan conversations? A. Yes, sir.

Q. All right. What did he tell you in that conversation about Orange? A. He called me on the phone, to begin with; I didn't meet with him. He called me on the phone and said, I have a fellow...he said, "Are you still interested in selling the plant?" And I said, "Well, no." For the reasons of the employees, I said, "No. We are just not going to go through that again." That was after I had met with him at the plant, so I had no... well, anyway. He said, "Well, the bank has an old customer that we would like to come out and take a look at it, and if he wants to buy it he can just write you a check for whatever amount you would want to sell if to him for."

Q. He said Orange was an old customer? A. Yes, sir.

Q. Did he use that phrase?

* * *

[392] Q. And what did...Mr. Herbert then told you that Mr. Orange was interested in a management proposition? A. No, sir. Not like that.

Q. Well, he did indicate that; transmit that information to you? A. Well, yes, sir. He transmitted the information that Mr. Orange was interested in management of the company.

Q. Yes. And then did you and Orange get together and discuss the matter? A. Yes, sir.

Q. Did Herbert do anything other than tell you that Orange was interested in, perhaps, some management arrangement? A. Did he do anything, sir?

Q. Say anything? A. Did he say anything?

Q. Or do anything or give you any other information other than that? A. Yes, sir. He said that unless you are willing to take Mike Orange in as a principal of this business, the bank will go no further. That is it.

Q. And that meant what? A. Well, that the bank would go no further, and that was

* * *

[396] Q. Did anything happen to your inventories to make them less saleable between December the 12th, 1978 and January the 8th . . . indeed, January 15th, 1979? A. No, sir.

Q. They were just as marketable on the December date as on the January date, weren't they? A. Yes, sir.

Q. So, at some point you and Orange, then, started talking about management. Right? A. When you say management, do you really mean talking about transferring the stock or how he was going to head the company up? I am not sure.

Q. Well, it is the same thing, isn't it? A. Well, yes, sir, it is in a way. But, then, no, it is not. Larry Whitehead was the general manager but he had no stock options or stock interest in the company and was an officer of the company. But we didn't negotiate his management position. We negotiated the stock.

Q. Well, let me ask you this: When this letter that Kaufman wrote . . . Mr. Kaufman wrote on the 21st of December, 1978, he was the company's lawyer, your company's lawyer, was he not, when he wrote that letter? A. He was employed by Mike Orange, yes, sir. So —

* * *

[420] A. Well, I had a Mark IV. Yes, sir.

Q. Had belonged to the company and was transferred to you. Is that right? A. I think that is right. Yes, sir.

Q. And weren't the books adjusted to show that as a year-end bonus to you as president of the company? A. I am sure it would have reflected it. And if that is it, that is what it reflects.

Q. Now, you did agree to waive notice for the foreclosure of these assets and agree to a private sale of assets rather than an auction, did you not? A. I didn't agree to anything. I signed whatever Mr. Herbert asked me to sign.

Q. I beg your pardon? A. I didn't agree to anything. I only signed whatever Mr. Herbert asked me to sign.

Q. Well, you knew what you were signing, didn't you? A. Not really. No, sir.

Q. You didn't read it? A. No, sir.

Q. Did you have a retained attorney at that time? A. No, sir.

Q. How about a fellow named Farley Moody in Birmingham? A. No, sir. He was not a retained attorney at that time.

[421] Q. To refresh you recollection, let me show you Defendant's Exhibit 18.

MR. NACHMAN: We would like to introduce that, Your Honor.

MR. WILSON: We object to it, Your Honor.

THE COURT: On what basis?

MR. WILSON: On the basis it contains hearsay statements.

THE COURT: Well, I would have to look at it and talk with you about it. Let's get around here with the Record.

(Whereupon, the following side-bar conference was had out of the hearing of the Jury:)

THE COURT: I presume that this is a letter that came to them from him, is it not?

MR. WILSON: Yes, sir.

THE COURT: I think he would have to explain it. I will overrule your

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[425] Q. Yes, sir. A. The dates are incorrect.

Q. I see.

Now, did you, after the transaction was closed — by that I mean the foreclosure was completed — did you express either to Mr. Herbert or to Mr. Orange that you were delighted with the outcome of everything that had occurred? A. I have never used the word delighted.

Q. That you were satisfied or pleased? A. All I said to Mr. Herbert when I walked out the door was, "I am glad this is over" period.

Q. You didn't say you were delighted? A. No.

Q. You didn't say you were pleased? A. No, sir.

Q. Now, the fact of the matter is, Mr. Parsons, you obtained some significant financial advantage by what occurred, did you not? A. No, sir. That is not the fact of the matter.

Q. Isn't it a fact that you were relieved of a personal guaranty to pay a hundred and seventy-six thousand dollars to Mr. Hodge? A. Yes, sir. That occurred.

Q. That eliminated that. Right? **[426]** A. Yes, sir.

Q. And you also were relieved of your personal guarantees to the bank on these notes, were you not; these three notes?

Do you know the three I am talking about? A. Yes. By virtue of the fact that there was no money owed the bank I was relieved of that guaranty. Yes, sir.

Q. And your wife was. Is that right? A. Yes.

Q. And the Mobile company was relieved of an obligation . . . of a guaranty obligation of some two hundred thousand dollars. Isn't that correct? A. Yes, sir. That is correct, too.

MR. NACHMAN: Your Honor, could we have a side-bar conference on a matter that I am fixing to go into?

THE COURT: Yes, sir.

(Whereupon, a side-bar conference was had between Court and counsel, out of the hearing of the Court Reporter, after which the following occurred of Record:)

THE COURT: Speaking of the next recess, I am thinking about taking a recess about twelve o'clock or shortly before

* * *

[428] Q. (Mr. Nachman continues) You mentioned something about your inventory being marketable. Am I not correct that there was a certain change in your business, in the type of fabrication that your business would produce, that made some of your steel materials less than marketable, at something less than their actual price? A. No, sir.

Q. Didn't you have certain changes in your business so that some of your inventory didn't meet standard building codes? A. No, sir.

Q. That never occurred? A. No, sir.

Q. When an inventory was taken in connection with this Ajax Atlas matter . . . do you remember your testimony on that? A. Yes, sir.

Q. Was there any evaluation attempt made there or was that just a piece count? A. Both.

Q. Did you treat certain receivables as so-called "litigation receivables"? A. Yes, sir.

Q. About what proportion of your receivables were they? **[429]** I am talking about as of November 30th, 1978? A. I don't recall the exact amount, but a large portion would be subject to litigation.

Q. And does that mean that the people you said owed you money said that they didn't owe you money, and you all were in court on that proposition? A. Well, yes, sir. It meant that there was a problem of some type on the receivable.

Q. In other words, you were saying to somebody that you said owed you money, "You owe me so much money," But that person was saying, "No, I don't." And, so, you all were going to litigate the matter? Is that what you mean by litigation receivables? A. Yes, sir, in simple form.

Q. Now, on your November statement, Plaintiffs' Exhibit 9 which is in evidence, is there any notation or distinction or any other indication on that statement that any of your receivables were in that litigation category? A. No. There is no indication on the statement that they were in litigation. No.

Q. But a substantial portion of the receivables shown on this statement were in litigation. Is that correct? A. A portion . . . yes. A substantial portion, but I **[430]** don't know the exact amount.

Q. Did you consider that to be in accordance with generally accepted accounting principles, that litigation receivables aren't so indicated on a financial statement? A. I can't answer that.

Q. You can't answer that.

Now, am I not correct that the inventories which are shown on this Plsintiffs' Exhibit 9 were written-down some one hun-

dred sixteen thousand dollars on the statement as of December 31, 1978?

MR. WILSON: We object.

THE COURT: What is the basis for your objection?

MR. WILSON: A matter not before Mr. Herbert at the time the condition —

THE COURT: A what?

MR. WILSON: It was not before Mr. Herbert at the time the condition was made by him.

THE COURT: What was not before him?

MR. WILSON: The entry in the financial statement that Mr. Nachman —

THE COURT: Wasn't it before him? We have been talking about it?

[431] MR. WILSON: Not any December entry, Judge. This occurred in . . . the requirement occurred on the 12th of December. He is talking about an entry after that time, and we would submit, for that reason, it doesn't have anything to do —

THE COURT: An entry after what date?

MR. NACHMAN: Your Honor, we propose to show that the inventories which show on the November 30, 1978 statement that I have just called to Mr. Parsons' attention, were written-down by some one hundred sixteen thousand dollars on the December 31, 1978 statement. And we have heard a great deal of testimony about value of inventories, and I wanted to ask what occurred to cause this write-down of a hundred and sixteen thousand dollars.

THE COURT: I will overrule the objection.

Q. (Mr. Nachman continues) You may answer, Mr. Parsons. What occurred to cause a write-down of a hundred and

sixteen thousand dollars of inventory between November 30, 1978, and December 31, 1978? [432] A. The normal course of business for a month's period of time would consume at least a hundred thousand dollars in inventory.

Q. You were selling that much a month? A. Yes, sir. I am sure it would have consumed that much.

Q. All right. Now, do you see an entry on this . . . Look at the item "machinery and equipment" on that Plaintiffs' Exhibit 9. Do you know whether that item "machinery and equipment" included some form rollers? A. You mean a roll former?

Q. A roll former? A. An essential piece of equipment.

Q. Yes, a roll former. A. Yes, sir. I would think so.

Q. And do you know whether that was put on the books as a capitalization of the salaries paid to the employees who worked on that roll former? A. I know that the piece of equipment was put on the books by the initial purchase price, the cost to restore back to its operational condition, which included the wages paid to the men who did the work, and all the tools and machine work done outside the plant. So, yes, sir.

[433] Q. Who are the employees who did the work? A. There were three employees in our maintenance department and I think all three of them worked on it for something over a thousand hours, or about a thousand hours.

Q. Did Mr. Burgess work on it? A. Yes, sir. I am sure that he was the main one.

Q. Did Mr. Mason work on it? A. Yes, sir. I am sure he did, too.

Q. Who else worked on it? A. There was a young helper, as I recall. I can't recall his name. But I think there was a third man.

Q. He was a young helper? A. He was a helper. Yes, sir. A maintenance worker helper.

Q. I may have asked you this and I apologize for the repetition, but is your testimony that your company did not discontinue any products line during 1977? A. No, sir. That is not my testimony.

Q. You did discontinue certain product lines during 1978? A. Yes, sir. That is right.

Q. What were they? A. Well, we discontinued the custom fabrication business **[434]** at some point in 1978, and late in 1978 we discontinued the manufacturing of certain agricultural items.

Q. And is your testimony that these changes had no effect on the values of inventories that you had in store for the lines that were subsequently discontinued? A. Yes, sir. That is true. It had no effect on it. These materials were bread-and-buter products you buy from U.S. Steel or Bethlehem Steel, and they could be used in a number of different items. They were not specialized to anything.

Q. I may be a little bit confused here. Do you mean by that that they could be sold outside of your business, or that they were equally useable within your business for the new and different business lines that you had gone into? A. Both.

MR. NACHMAN: Your Honor, may we have a conference with the Court?

THE COURT: Yes. It may be a good time to break, isn't it?

MR. NACHMAN: It could be. What I —

THE COURT: All right.

I am going to excuse the Jury until

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Testimony of June Neely Williams

[486] A. Mr. Herbert, Mr. Norris and I and Mr. Parsons.

Q. All right. Did your Mr. Parsons submit any financial information to Mr. Herbert at that particular meeting, if you remember? A. Well, not a financial statement. No.

Q. Any type of information? A. Oh, we took some other things up there that the bank had requested. I don't know whether Mr. Herbert had requested them or Mr. Richardson. But it was in connection with the loans that we had, and they had asked for some information and we took some of that up there.

Q. Do you remember what that particular information was that you took with you? A. Well, I know we took. . .I am not sure, but I think we took the receivables and we took the appraisal that we had had made of the property, and we took . . . I think it was either titles or deeds or something like that to prove the ownership of the property, and probably the payables. I am not sure about that, either.

Q. All right, ma'am. Let me ask you some questions about that.

When you say you took the receivables, explain to me exactly what you mean by that? [487] A. A listing.

Q. Would the same be true of the payables? You are talking about a listing of the payables? A. Yes, sir.

Q. All right. Now, you referred to some deeds to real estate. What real estate would that be, Mrs. Williams? A. The property that the plant was located on.

Q. Do you know who owned that property? A. Parsons Steel in Montgomery owned the property.

Q. All right. Now, in this first meeting you had with Mr. Herbert and Mr. Parsons that you have just described for me, I

want you to tell the Court and Jury, if you will, what was said by Mr. Herbert in that meeting. A. Well, Mr. Herbert proceeded to make us very, very comfortable. And I think we had a cup of coffee and we talked about our loans, and Mr. Herbert said that he had some of the information that he needed to assess our situation, and he would need a financial statement. And he said that he saw no problems; he didn't see any reason why we couldn't work things out to get additional monies if we needed it, because that is what banks were for.

Q. Did he at any time in this meeting say that he or the bank was dissatisfied with the loans of Parsons Steel here in Montgomery?

* * *

[489] A. Yes, sir, I did.

Q. Now, after that information was delivered to Mr. Herbert, did you have an occasion to have a second meeting with him? A. Yes, we did.

Q. Do you remember about when that was? A. I believe the date was the 12th of December.

Q. About how long was it after you actually took him that statement down there? A. Well, it wasn't very long because I knew we were surprised that he had had time to review it and get back with us that soon.

Q. Okay. This second meeting or talk, where was it held? A. At the bank.

Q. Do you remember where in the bank? A. It was in a conference room.

Q. There near Mr. Herbert's office? A. Yes, sir.

Q. All right. Who was present in that meeting? A. Mr. Herbert, Mr. Parsons and I.

Q. All right. Mrs. Williams, if you will, tell the Court and Jury what was said by Mr. Herbert in this second meeting at the bank? A. Well, Mr. Herbert said that he was not pleased with **[490]** what he had; what information he had, and that he would not make any further loans to the company unless we employed. . .or, not employed. I guess it wouldn't be employed. Unless Mr. Orange came into the company and he was issued part of the stock of the company; a principal part, I believe he said, of the stock.

Q. You believe he used the term principal? A. I am not certain whether it was majority or prinicipal. I am not. . .I am sorry. It has been a long time ago and I can't quote it exactly.

Q. Was there any other discussion that day concerning the loans? A. Well, he indicated that if we went . . . if we did these two things, that the loans would be no problem; that we would be advanced any monies that we needed.

Q. What two things did he indicate if you did there would be further loans?

If that is not too confusing? A. That Mr. Orange be made chief executive officer of the company and that he be issued. . . or have an option, I think it was, on the stock in the company.

MR. WILSON: That is all we have, Your Honor.

Please answer Mr. Nachman's

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[493] . . . Q. We have now identified that affidavit as Defendant's Exhibit 27. Let me call your attention to Page 3 of that, and ask you to read along with me, if you will, Mrs. Williams.

"Parsons Steel Industries did not need immediate loans in November or December of 1978 because of the availability of sufficient cash flow to operate on at that time. This was known to Mr. Jim Parsons, Mr. Herbert and to me."

Is that an accurate statement? A. That is just like it is printed here.

Q. And is that your sworn statement? A. Yes, sir, it is.

MR. NACHMAN: Thank you.

We would like to introduce this affidavit into evidence.

THE COURT: It is admitted.

MR. WILSON: No objection.

Q. (Mr. Nachman continues) Now, Mrs. Williams, did I understand you correctly that this is not correct, in fact, and that the company did need money at that time in December of. . .December 12, 1978, and that in fact it was behind in its payments to most of its trade creditors?

* * *

[498] A. I just told. . .answered that a minute ago.

Q. Yes, ma'am. But if you don't mind, just give me your best recollection of what exactly Mr. Herbert said about bringing Mr. Orange in, and that circumstance? A. Well, he said that no further monies would be available until Mr. Orange was brought into the company and made a principal, or a majority stockholder, or something to that effect.

Q. And that if he were? A. That if he were, additional monies would be made available.

Q. Was anything said about any specific amount of money that would be made available? A don't think so. I don't recall.

Q. At either one of those conferences, either the first one in November or the second on on December 12th, 1978, was anything said by you or Mr. Parsons about needing either two hundred and fifty thousand dollars or six hundred thousand dollars? A. I don't know.

Q. You don't remember any such statement? A. No, sir, I don't.

Q. Not at either one of those meetings? A. No.

* * *

Testimony of William Richardson

[549] reworking the debt, I asked Jim for a second mortgage on his home in Montgomery as part of the additional collateral, and which he refused to give, but worked out an alternative plan to pay a hundred thousand dollars on the debt which he would get from the Mobile corporation and pay it shortly thereafter. Which would alleviate us from putting a second mortgage on the reworking of the debt.

After that, I had several contacts with Mr. Parsons about possible sale of the company, and this type of thing. And then shortly —

Q. Excuse me. Go ahead. A. Shortly after I gave my resignation, I gave them notice I would leaving, Jim brought in a potential buyer that the bank reviewed.

Q. Would that have been Ajax Atlas, to your recollection? A. I believe that was the name of it; the Ajax Atlas Corporation.

Q. All right. What do you understand occurred with regard to the Ajax Atlas matter, as you may have any knowledge of it?

MR. WILSON: Your Honor, we object to that He was not at the bank at that time and would have no knowledge.

* * *

[560] as of approximately October 1, we will close a six hundred thousand dollar term loan secured by all equipment and all real estate, repayable over a five year period at ten thousand dollars per month plus interest. This will leave us approximately two hundred and fifty thousand dollars as a short-term line secured

by inventory and receivables, and an additional two hundred thousand dollars which is a one-time arrangement whereby we are financing some galvanized steel coil inventory for this company, and this loan will be paying out over the next few months."

Did you make that notation? A. I did.

Q. And the six hundred thousand dollar term loan, I believe your terminology, "we will close a six hundred thousand dollar term loan secured by the following . . . repayable over a five year period — A. I have already testified to —

Q. — at ten thousand dollars per month plus interest." Is that correct? A. Right.

Q. So, the plan of the bank, then, at that time, was to close a six hundred thousand dollar term loan, and that is why you asked Mr. Parsons, you say, for

* * *

Testimony of M. Orange

[781] A. He explained to me that the inventory had been overstated because he was making the statement with a view to getting the best possible price from a purchaser.

Q. Did he say who the purchaser was? A. Well, I was one of them.

Q. Who was the other? A. No. He just said purchaser. He didn't say.

Q. So, he admitted to you, if I understand your testimony correctly, that he purposely overstated the value of the assets of the company so that he could get a better figure from you as a prospective purchaser? A. Yes, sir.

Q. All right. So, he was not revealing the real . . . what his opinion was as to the real value of the assets? A. Yes, sir.

Q. How much less was his view of the real value of the inventory below what was shown on that November 30 balance sheet? A. He gave me a rough estimate of about three hundred fifty thousand.

Q. As compared to what? A. About a million . . . over a million.

Q. Now, the figures you are using "over a million" is that the November 30 financial statement, and if so, — [782] A. Yes, sir. He and I were both, —

Q. All right. Would you refer to the records so we won't be confused as to the exhibit number of the November balance sheet? A. I referred to the one million two-thirty on Exhibit 9.

Q. Plaintiffs' Exhibit 9. All right, sir. And the same reference . . . reference is to the same exhibit on accounts receivable. Is that right? A. Yes, sir.

Q. All right. Go ahead. A. And he indicated to me that, if anything, we would have to buy some material because some of it was not useable on the orders that we had, and there was no way that we could sell any of this inventory.

Q. All of the things you are saying now are matters that Mr. Parsons stated to you, is this correct? A. Yes, sir. This is my first thirty minutes at work.

Q. Now, to then get to the point you were just on, did he elaborate or explain in any way why a portion of these inventories were not useable in the business, in the manufacturing business? A. Yes.

Q. Parsons Manufacturing business? A. We . . . He didn't get into any great detail, but I [783] understood from his previous explanation that he had gone out of the agricultural business, and what he had left over was the remains or the surplus of that product line.

Q. This is what you testified to this morning; the one change in the summer of '78 and another change in October of '78? A. Yes, sir.

So, this is where it came into play.

Q. All right. A. And then, also, he had a great deal of heavy steel around very thick steel, for his fabrication. And that steel could not be used in the buildings which was now his only product line because he wasn't making I-beams. That heavy steel could have only been used for I-beams.

Q. And C-beams? A. Not C-beams. But he was using C-beams. So, again, the steel was surplus.

Q. What else did you . . . Is that . . . A. No. Then I was pretty crushed because —

Q. Well, before we get into your state of mind, is there anything more wrong with the inventory that you discovered on

this first day of business? A. No. That is about the gist of it.

* * *

[806] Q. Before . . . Let me interrupt you a second.

Was that the first time that plan had been proposed to you? A. The very first.

Q. Did Herbert or anybody connected with the bank ever propose that plan? A. No, sir.

Q. Parsons proposed it for the first time — A. Mr. Parsons —

Q. — insofar as you were aware of the plan? A. Yes, sir.

Q. All right, sir. Go ahead. A. And he explained that the bank was in a dilemma if they should foreclose, because the Mobile corporation owned the land, yet the equipment and all the other assets that they were foreclosing on were on that land. And that was a real problem for the bank. And I . . . His exact words were, "The bank wants this real estate so bad they can taste it." And he said, "Therefore, this is a good plan." He said, "I will be relieved of all personal liability. I will be relieved of my guaranty, and the bank can have this land."

Q. You say those were his exact words? A. The bank wants it so badly they can taste it.

[807] Q. Did you write that down, or do you just recall it? A. No, sir. I didn't write it down.

Q. All right. A. But . . .

Q. So, what else did he propose; Mr. Parsons? A. And then he went through the details of the plan whereby I could become the sole owner of Parsons Steel Industries because the bank had confidence in me, and now that they had . . . that I was the missing ingredient for a plan like this. If he had had somebody like me before, it might have been done before. But now that we had the missing ingredient, he could go ahead with this plan.

Q. What was the missing ingredient? A. Somebody the bank would have confidence in.

Q. Had you ever, prior to this time, had any conversations with Herbert or anybody else with First Alabama Bank about this plan? A. No, sir.

Q. Or any such similar plan? A. No, sir. No plan.

Q. So, what did Parsons propose to do? A. He proposed that the bank foreclose and that then he would sell directly to me the real estate in question and then I would buy the remaining assets from the **[808]** bank.

Q. Where were you — A. And that was the plan.

Q. And where were you to get this money? A. He stated that the bank would be prepared to advance the funds . . . no. Excuse me. He didn't say that. I . . . He stated that he was confident that he could carry off a plan like this. He had not discussed it with the bank, either, he said.

Q. He told you that? A. Yes, sir.

Q. And was . . . Did he say anything at that time about any obligation to a man named Hodge for a hundred and seventy-six thousand dollars arising out of the purchase of the stock in this company a few years before? A. I don't remember that.

Q. That doesn't — A. I don't remember that.

Q. You don't remember that coming up in this conversation? A. Right. He was only saying that he would be relieved of all personal liability to the bank. That would accomplish his objective. The bank would get the real estate and that would accomplish their objective. I would get a company. Everybody ought to be happy.

Q. That is what he said?

* * *

[810] Q. And when did you see him next or talk to him next about this plan? A. At eleven o'clock, roughly eleven o'clock in the morning he came back and he was walking on air.

Q. This is still on the 5th of January? A. Still that morning, eleven o'clock. He was jubilant, happy, excited. He said, "The bank bought it. I told you I could do it." He said, "We are proceeding with this plan. If the creditors don't come in by January 15th we are in business."

Q. All right. A. And then . . . I could hardly believe it, but then Mr. Parsons left . . . Yes, sir?

Q. Did you verify this with Ed Herbert? A. No, sir. Not for many days.

Q. When did you talk to Herbert about it? A. I either talked to Herbert Tuesday, January 9th, or Wednesday, January 10th.

Q. Did you and Parsons have any discussion about bringing Sam Kaufman into this matter at this time since he had represented the company in composing and sending out the letter of December 21st? A. Mr. Parsons and I were both very angry at Mr. Kaufman for not allowing us to choose which plan suited us. He was dictating to us that he wanted Chapter 11. So —

[811] Q. Instead of what? A. Instead of what he had called the quick method. And he never elaborated what that quick method was.

So, we were angry at Mr. Kaufman and we decided that — and I consulted counsel later — that since nothing was going to happen until Monday, January 15, we would delay answering Mr. Kaufman until Monday, January 15th.

Q. And you and Mr. Parsons jointly decided that? A. Yes, sir.

Q. Now, the counsel you consulted — A. Was Henry Hardegree.

Q. Another lawyer in Montgomery? A. Yes, sir.

Q. He didn't represent First Alabama Bank? A. No, sir.

Q. All right. So then you went back . . . or went to Herbert on the 10th, you say, the 9th or 10th? A. 9th or 10th. And that was the first time that I learned that, believe it or not, the bank said yes.

Q. And what arrangement did you make with the bank? A. And then we discussed a plan. And part of the plan was that I would have a corporation organized and this corporation, this new corporation, was prepared to buy these assets.

[812] Q. Was the new corporation first called Standard Steel Services, or something? A. Standard Steel Building Systems, Inc.

Q. And was that name changed to O.S.I.? A. Yes, sir.

Q. So that the corporation that is now O.S.I. began as Standard Steel Building Systems, Inc.? A. Yes, sir.

Q. And simply changed its name? A. Correct.

Q. Go ahead. What other parts of the arrangement did you make with the bank? A. Well, beginning with January 5th —

Q. Well — A. — with the bank?

Q. Yes, sir. You are at January 10th? A. January 10th; the morning —

Q. You and Herbert are working out arrangements. You are going to set up this corporation. A. Yes, sir.

Q. And what else is going to happen? A. This corporation would then borrow money . . . I would organize the corporation and pay for that. Then the corporation would . . . I also agreed to use my own money to buy the real estate. And —

[813] Q. By your own money, you mean money other than money advanced by the bank? A. Yes. I would not take an advance from the bank. I was going to use my own funds for the real estate.

Q. How much? A. Three hundred seventy-six thousand.

Q. So, you put up three hundred seventy-six thousand dollars of your own money? A. No. I agreed, I agreed, in speaking to Mr. Herbert, that I would put up —

Q. I see. A. And then the balance would be advanced to enable this company to buy the remaining assets of . . . that were foreclosed upon.

Q. And was there any changes made in that plan? A. Well, this was a skeleton of a plan. This is not a final . . . but in outline we reached an agreement; in outline.

Now, at this meeting I had my attorney present —

Q. This is Mr. Hardegree? A. Mr. Hardgree. And he was working out the details and discussing —

Q. Did Mr. Herbert have any attorney? A. I beg your pardon.

Q. Did Ed Herbert have any attorney present? **[814]** A. No, sir.

Q. Go ahead. A. It was my attorney and I. And we went through this outline of what was required to carry out the plan.

Q. And what ultimately turned out to be the plan? A. That . . . subsequently the bank said, "It won't be necessary. We are agreeable to lending you the money for the land, also." It will be just more expedient, I guess. And they advanced the money and I bought the assets.

Q. How much, all told, was the loan for; the loan to your company? A. Roughly, one point two or one point three million.

Q. And part of that, of course, was a loan already outstanding with the bank? A. It represented the principal outstanding plus all accrued interest. All interest accrued and not paid.

Q. And how much new money? Three hundred and seventy-six thousand? A. I beg your pardon?

Q. How much new money? Three hundred and seventy-six thousand? Is that how much new money the bank advanced or was it less than that? A. It came out to less than that. I think the new money advanced may have been in the area of three hundred **[815]** thousand, maybe.

Q. Could it have been as low as a hundred and seventy-six thousand? A. There was a hundred and seventy-six plus two hundred.

Q. The two hundred, am I correct, was to pay off the existing mortgage on the property? A. yes, sir.

Q. And the hundred seventy-six thousand was to go to Hodge? A. Yes, sir.

Q. And that would relieve — A. That would relieve Mr. Parsons of his personal liability there, also.

Q. He had a personal liability with Hodge for the hundred and seventy-six thousand? A. Yes . . . Yes. So, in one fell swoop he would get out his personal liability to the bank and he would get out of his personal liability to Mr. Hodge on the money he owed him.

Q. And the Mobile company would get out of its obligation — A. And the Mobile company would have the realty free and clear, to sell.

Q. Do you have any notations in your diary there or any precise recollection as to the date on which the Mobile company deeded this property? **[816]** A. Yes. According to my books, on Thursday, January 11 at eleven A.M., Mr. Parsons and I

went to Mr. Hardegree's office and for the . . . to consummate the purchase of this realty.

Q. That was purchased on January 11th? A. Yes, sir.

Q. Did Parsons sign the deed? A. Yes, sir.

Q. On behalf of the Mobile company? A. He came to that meeting with his wife, and whatever the lawyers gave them that was necessary, I guess they signed.

Q. Mike, was it necessary for somebody to go from Montgomery to Mobile to get certain papers executed or bring certain papers from Mobile to Montgomery in the process of this closing? A. Yes, sir.

Q. Who did that? A. Mr. Parsons went to Mobile, I think right after that Thursday, because he was not in Montgomery on Friday, January 12th.

Q. What — A. Or he left that morning to go to Mobile.

Q. Well, do you know whether he went to Mobile? A. (No response.)

[817] Q. Let me make the question clear. Do you know whether Mr. Parsons had any role in getting papers back and forth between Montgomery and Mobile in connection with this transaction you have described? A. Yes. He said he was personally going . . . He had to go. Yes. He was going and he was going to bring them back.

Q. All right. Did he? A. Yes, sir.

Q. Now, you were present, I assume, when the assets that the bank had subject to the security agreement and had taken possession of, when they were sold were sold by private sale to your company. Is that correct? A. Yes, sir.

Q. Was Parsons there? A. No. No, sir. He was not there.

Q. Was he made aware of the closing out of all these matters? By all these matters, I am talking about the bank sale of the assets? A. Oh, he knew about it, but he wasn't there on January 17th.

Q. But he was advised when everything was done? Was he or wasn't he? A. No. He was advised that it was going to be done.

Q. Well . . . Did he ever become aware that it had been done? **[818]** A. Not that I know of.

Q. Did he ever express to you any feeling with regard to the accomplishment of this matter; any feeling of his own? A. Yes; he was overjoyed when the foreclosure took place.

Q. Well, that . . . Did he express that to you? A. He wanted me and the two girls that worked in the office, he invited us to go have a drink with him to celebrate that.

Q. The accomplishment of these matters? A. Yes, sir.

Q. This was after they had all taken place? A. This was on January 15th, after the foreclosure. It was about two thirty, three o'clock in the afternoon, and he wanted to go celebrate with me and the two office people then that remained.

Q. He did, then, express pleasure that this transaction had — A. He had his arm around my shoulder when we walked down the stairs.

Q. Well, regardless of where his arm was, did he express satisfaction? A. He was very pleased; he was relieved of liability on all counts, and he was a free man.

Q. Now, I want to be very clear now. This whole plan, as **[819]** I understand your testimony, was Parsons' idea that he sold to the bank? A. Yes, sir.

Q. It was not the bank's plan? A. No, sir.

MR. NACHMAN: You may cross-examine.

Cross-Examination

By Mr. Beasley

Q. Let me make sure I understand that last summary by Mr. Nachman.

You are telling this Jury that — A. Yes, sir.

Q. — that a bank in this city loaned you . . . or not you, but a corporation that you had just formed, one point three million dollars and required nothing more than the brief conversation that you have described to this Court. Is that correct? A. We were implementing a plan.

Q. No, sir. That is not my question. The question is: Did a bank in this city, specifically Mr. Ed Herbert's bank the First Alabama Bank, loan a corporation that you had formed one point three million dollars with no more conversations with you than what you have testified here today? Is that correct?

MR. NACHMAN: Could we request that counsel

* * *

[897] Q. Do you recall Mr. Orange's testimony that this plan that was called a contingency plan was first proposed to you by Mr. Parsons? A. Mr. Parsons came in my office on the 7th or 8th of January —

Q. Of '79? A. Of '79, and told me, in essence, that he was assured that the composition plan that had been sent out for the creditors to accept was not going to be accepted, and he didn't want to go into Chapter 11 bankruptcy.

And his words to me was that very few people ever survive and come out of a bankruptcy proceeding, and he would be dead in the steel industry if he did it. Meaning he would lose everything he had, the way I took it. And he had a plan. He

knew that if I went ahead and foreclosed — and we had discussed that — I would end up with the machinery and equipment and inventory, and this sort of thing, but his Mobile corporation would own the lands and building, and I would be faced with piece-mealing this, whatever inventory goods I had, out on a distressed market. And I have been through this before and you are lucky to get twenty-five cents on the dollar when you put it out for grabs.

Q. Let me ask you this, Ed, before you get into that.

[898] That was Parsons' plan. Is that right? A. That is right.

Q. Had you ever proposed it before to Parsons? A. Absolutely not. It was his idea that he came in and proposed somewhere around the 7th or 8th of January, when he learned that the composition of creditors was not going to work. He knew that, as a going business, you have a chance to survive and I knew that it had a chance to survive. And my big concern was that his Mobile corporation owned the lands and building and if they paid off this two hundred thousand dollar mortgage on there, then he could simply tell me, "Get your stuff out of my building," which I would have to do and I would have to virtually give it away to get rid of it.

Then my alternative was to come back against him for any shortages and sue him for the five hundred thousand dollar guaranty.

Now, that is a rough way to try to settle a long-standing relationship that gets in trouble. I would prefer to work it out some other way and he knew I would.

So, I had to weigh the proposition of putting up another hundred and seventy-six thousand dollars that he said he owed Mr. Hodge for the stock, and his **[899]** words to me is, "If I can get this much money, I can pay Mr. Hodge off for the stock and then I will own it all and I can do with that real estate what I want to do, and I would be willing to sell it. And that way you

will have a going business, the lands, buildings, machinery, and equipment and everything, and it won't have to go out of business and be piece-mealed or go through bankruptcy." Well —

Q. So, this is why you agreed to go along with it? A. That is right. This would then put it in a manageable, cohesive unit that could be dealt with. You could do something with it. Your chances of getting your money back in a situation like this are much better if a business can continue to operate rather than just close it down and destroy it. That is what prompted me to be receptive to his plan.

Q. Now, let me show you Defendant's Exhibits 28 and 29. One is a letter of January 8th, 1979 which I read to the Jury this morning, and the other is Defendant's Exhibit 29 which I also read to the Jury this morning. A. Yes, sir.

Q. The first . . . Did you send the letter of January 8th out after you had this conversation with Jim Parsons which you just described? **[900]** A. It was a direct result of our conference.

Q. In other words, that the notes are now due and you are calling them? A. Subject to all of the creditors' accepting the plan, and they had until one o'clock on January 15th to accept it. I called the loan subject to that.

Q. And then 29 you sent out on January the 15th?

Do you have that there? A. On January the 15th?

Q. Yes, sir. Defendant's Exhibit 29. A. Yes, sir, I have that.

Q. Now, the letter, which, as I say, I read this morning, gave five days' notice that the bank was going to sell the collateral which was securing the loan. And then at the bottom, there is an acknowlegement of that, and under the company's signature by Parsons as its president, it says, "I see nothing to be gained by any delay and waive the five days' notice and consent that you take whatever action is necessary?" A. That is right.

Q. Did he also consent to a private sale? A. Yes, he did.

Q. Did he know what he was doing when he signed this? A. Obviously he did.

Q. Had you discussed this with him? **[901]** A. In detail.

Q. And what did he say? A. He was all for it; very enthusiastic that we would go along with this and get him off of his personal liability.

Q. Which was how much? A. Well, it was about a million one to the bank. He owed us about a million one and he owed Hodge another hundred and seventy-six thousand dollars.

Q. Now, you stated earlier that his personal guarantee was for five hundred thousand. Actually, he had a personal guarantee on all three of these notes, didn't he? A. Yes, he did.

Q. And his wife had one on the five hundred thousand dollar note? A. That is right.

Q. Up to two hundred thousand? A. And pledged the real estate.

Q. Up to two hundred thousand? A. That is right.

Q. All of those would have been subject to liability, would they not? A. Oh, yes.

[902] Q. And then the one hundred seventy-six thousand was for what? A. That was to pay Mr. Hodge for his remaining stock. We couldn't have done that unless Mr. Parsons was fully in accord with it. Anywhere along the line he could have stopped. He didn't have to do it.

Q. Now, on January 12th. I believe you presented this plan to the directors. Is that correct? A. That is correct.

Q. Of 1979; the plan that you have just outlined? A. That is right.

Testimony of Edward Herbert

[903] August 31, 1979; July 31, 1980.

Q. And those are the dates the bank examiners came? A. That is correct.

Q. June of '78 and August of '79? A. That is correct.

Q. Did they come at any time between June of '78 and August of '79? A. No.

Q. Let me ask you this, Mr. Herbert. Did First Alabama Bank, through you or anybody else, ever require that Parsons or Parsons Steel of Montgomery or Melba Parsons, or the Mobile company, or anybody else make Michael Orange chief executive officer and president of Parsons Steel of Montgomery? A. No one from the First Alabama Bank ever made such a demand.

Q. Or requirement? A. No.

Q. Did First Alabama Bank ever make a requirement that Orange become a major stockholder of Parsons Montgomery? A. First Alabama Bank put no restrictions of any kind whatsoever. I simply —

Q. Did it ever make that requirement? A. I simply put the two of them together to work it out.

Q. Was this their plan; the director's plan? A. No. This was the plan that Mr. Parsons had proposed to me and I presented to the Board of Directors and recommended that we do it.

Q. I assume for the reasons you have just described? A. Yes. Well, it would simply be transferring the same amount of debts over to another and putting out a hundred and seventy-six thousand dollars to pay off Mr. Hodge, which would give free title to the land.

Q. Did you, at my request, make an effort to ascertain whether . . . or, what the dates were that the bank examiners came to First Alabama Bank during the years '77, '78 and '79? A. Let me read you this: March 29, 1976, June 30, 1978;

* * *

Portion of Plaintiff's Closing Argument

[954] . . . THE COURT: I have not excluded his testimony.

I let it in for what it is worth.

(Whereupon, Court was in recess for approximately fifteen minutes, after which the following occurred in the presence of the Jury and all parties:)

THE COURT: All right. Gentlemen, forty minutes to the side.

MR. BEASLEY: May it please the Court, and Ladies and Gentlemen of the Jury. I would like to first just thank you for your attention in this case. I have just sort of observed that every one of you have paid attention to about every single thing that happened, and I know it all happened mighty quickly. We anticipated a much longer trial than we had. The testimony went much quicker, and even the fights between the lawyers were possibly less in this case than in most cases, which I know you all appreciate. I have always felt like that when lawyers get

to fighting and fussing and the Judge has to call us down — and it always happens and we do, just by training and nature, sometimes get overly involved and, perhaps, do it to the damage of our clients. I don't think much of that happened in **[955]** this case. But, if it did, let me ask you not to hold what I might have done or what Frank might have done against our clients because we were representing them to the best of our ability, as Mr. Nachman did his client.

When you were selected to try this case, you were selected and took an oath to render a verdict based on the evidence. Now, what I say and what my interpretation of the evidence is is not binding on you at all. I have my opinions of what happened in this case, what happened back in '77, '78 and early '79. I believe that from the evidence that, collectively, a Jury can determine what did happen in this case; what happened to cause the final results.

Now, the facts came pretty fast, but when you think about what happened to the Parsons, it happened mighty fast. Let's go back and first see why we are here.

Mr. Nachman said anybody can file a suit; said anybody can just file a suit. Let me tell you, if this were a frivolous lawsuit, it wouldn't be before you right now. And let me ask you, also, to think back to the opening statements of both lawyers. Both lawyers.

Mr. Nachman's primary defense was that what **[956]** the bank did was a usual, customary, accepted bank practice. Now, during the trial, they also threw in some other things. First of all, they just flatly denied there was anything wrong, which we expected. We expected them to do that. But their real defense was that. And you recall his opening statement to you he said, "It was just an ordinary, garden-type of act by the bank." The act by the bank he was talking about was this: The bank required of a man who had worked in that business after he

bought it and had run it, required of him that he give up that business to a stranger, a man that he didn't even know. Give up ownership of it and give up the running of it by allowing this gentleman to become president and chief executive officer of the corporation.

Now, let me ask you first of all, does it make sense that a businessman would give up what he had worked for and what he had earned for one hundred dollars? Does that make sense? A lot of things in this case really hadn't made sense, but when you go back and look at the testimony and analyze it, people like Sam Kaufman, Luther Waller, even June Neely, had no reason to come to court and lie. She had worked for them and she now lives over in Mississippi and came and testified. Ed Hodge had no interest in the **[957]** outcome of this lawsuit; none whatsoever. And he came in here, and do you remember what he said? He said he went out there in October and November and December. He said it was — and I think I am going to quote him accurately — said it was an excellent manufacturing plant. He said the only thing he saw they had too much inventory. And do you recall, I asked him the question, I said, "Mr. Hodge, could that inventory have been sold?" He said, "Without question." I said, "Was it good and useable?" And he said, "Without question." He knew the operation of this plant. Why? Because he had owned it. And he said he had been back out there almost monthly from the day he sold it to Parsons, and he said in December, the critical month, that the inventory was there, it was useable, and it was inventory that could have been sold.

And the reason I asked these questions about the coils, when this case first came to my office and they were talking about coils, I related coils to automobiles. That is the only experience I had had in this field. I asked him what a coil realy was, and I looked at coils, and I found out that a coil could weigh as much as twenty thousand pounds. It could weigh that much. Can you imagine twenty thousand pounds of steel that would be us-

ed **[958]** to manufacture a number of items, not just one item as the defense would lead you to believe, but a number of items.

Do you remember what Mr. Hodge said that steel was worth? There was testimony, undisputed, thirty-three cents a pound. And do you recall how many coils they said was on the premises? He said too much. He said he had more inventory than what they could use.

Now, I asked him specifically — and remember what he said when I asked this question? I said, "Mr. Hodge, did you see any scrap as you toured the plant and looked over the facilities?" Do you remember what he said? "Very little. Very little, scrap. All of it was useable, good material."

This is why my good friend, Lannie Crane, who is an excellent accountant and was hired to do a job and he was hired to reach a result given certain information. And do you remember what he said when Mr. Wilson was cross-examining him, very nicely and very easily? He asked him this question: He said something to the effect, "Were most of the assumptions if not all of the assumptions that you made favorable to the bank?" He said, "Yes." "Where did you get the information?" "From Mr. Nachman or Mr. Orange and **[959]** folks on the other side." Nothing from Mr. Parsons. Nothing from anybody who worked for Mr. Parsons, except one secretary who is still out there who he said could give nothing significant. And he admits he didn't know what a coil was and he admits he never had really seen any of the things he was talking about. He didn't, for example, realize that you estimate work-in-process in many businesses, and that work-in-process is estimated; what could be, say a hundred and twenty thousand, in actuality could have been as much as five hundred thousand. No way for Lannie to know this.

But what I am saying is, Mr. Hodge did know. He had been there. He had seen it. He had owned, in fact, the business at one time; the plant. Can you imagine a plant sitting on twenty

acres of land? Three massive buildings? Do you remember what he said about the bay? He compared it to this courtroom. He said one of the bays would be the size of this courtroom. Now, there were many bays in that plant, you see. All of them functional, all of them operative, working with good inventory, good equipment. And if a man who had no interest came in this court and stated under oath that that was an excellent manufacturing facility, I would have to believe **[960]** him. They didn't try to cross-examine him, did you notice, on that point. Very, very light.

Now, obviously the witness who testified who are directly involved, obviously have an interest in the outcome. That would include Mr. and Mrs. Parsons, it would include Mr. Herbert; it would include Mr. Herbert; it would include Mr. Gaskell, it would include Mr. Orange, it would include a number of people who testified for the defense. But I have never seen so many inconsistencies between their own witnesses.

For example, Mr. Waller said — and I think he tried to tell it as straight as he could. He said he saw...felt sure he saw Mr. Herbert over there in a private meeting. He also said he recommended his law partner, Sam Kaufman, which certainly makes sense; if there is a fee to be made, he is going to recommend his partner. And that was back in early...on the 14th of December.

Mr. Orange said Mr. Herbert recommended Mr. Kaufman. Obviously, Mr. Kaufman was already involved. But Mr. Waller and Mr. Kaufman had no reason to come in here and tell anything but the truth.

Do you remember when we were talking about the 8th day — and I wrote it down and circled it for a reason. I said, "When did Michael Orange lose **[961]** interest in the plan you were trying to foster" — the lawyer — "and start on his plan and Mr. Herbert's plan?" And that plan was to turn over the business to a stranger who Jim Parsons didn't even know. I said...I asked

him several times — the Judge had to fuss at me about it a little bit, but I do that sometimes. I just want to make sure the Jury hears the important points in a trial — I said, "Did Mr. Orange, from that point on until the end of it, talk to you and ask questions about how this would work and how that would work; how he could buy it or anybody else could buy it; how this would work, the legal ramifications?" And do you remember what Mr. Kaufman said? He said, "Yes. Many times. Many times." I asked the same question of Mr. Orange: "No knowledge of it. Couldn't remember it." I asked him this. I said, "Why didn't you use Mr. Kaufman when you got ready to buy this business? Why didn't you use Mr. Waller instead of going out and forming this new corporation and doing it with secretaries and lawyers, not even using your own name, and not even using the initials that finally went into it? Why didn't you do that?" He never did give a very good answer to that, in my opinion.

Now think back for just a minute. This **[962]** bank loaned a person who formed a corporation — a shield-type corporation to keep the individual from having any liability, you see — formed a corporation, loaned that corporation without any assets at that time one point three million dollars. That is a lot of money. A lot of money.

Now, you can bring your own experience into this jury box. You do not have to shut out your experience when you come in to make a decision on a case. Let me ask you this: Would a bank loan anybody who formed a new corporation, unless he was a multi-millionaire many times over, one point three million dollars unless he got some of that multi-millionaire's collateral or some other assets to back up that loan? I don't believe he would. I don't believe Mr. Ed Herbert would do that because he has been in the banking business a long time, a long time. One point three million, Mr. Orange put up one thousand dollars. He got the land, he got all of the assets, all of the coils Mr. Hodge told you about, and Mr. Parsons, all of the equip-

ment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they get a valuable piece of property, they get a good business, they get the Parsons' business. And they **[963]** are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up.

I want you, when you go back into the jury room to deliberate to look and see if you can find anywhere in these records that have been put into evidence in this case where the bank has any records anywhere bad about Jim Parsons, Melba Parsons, or Parsons Steel, Inc., but specifically, anything bad about the company here in Montgomery. You won't find anything. The first thing you will find is Exhibit 59, I believe, where the Directors meet, and that exhibit will say, basically, that...well, I won't try to state it. I will read it to you.

I will say, exactly, the first report to that board...and remember this. Mr. Herbert wrote the manual. I want you to read, if you will — now, I hate to ask you to do this because it is fairly thick — but find the sections in here that define the responsibilities of the loan officer, find Mr. Herbert's responsibility in this book, find the directors loan committee's responsibility in this book, and see exactly what it says they are supposed to do. And then after you do that, you take the documents **[964]** that show the transactions...and you recall what Dr. Dense who testified who we hired as an expert — and we certainly don't apologize for that. Each side has a right to bring in experts and put them on the stand, especially in critical points. And the critical point in this case is — was there a violation of the bank holding company act. The critical issue is was what the bank did — which they now deny, or which they spent most of their time trying to justify, if you remember — was that a usual, in other words a customary, accepted, appropriate banking practice; as Mr. Nachman says, a garden variety type act by the bank?

I want you to go back and look at the records and find anywhere in here, up until the bank did this to the Parsons, where they say anything but good about the Parsons, about this business. And then take...Mr. Hines made this report, and I guarantee you that Mr. Hines hated to testify in this case. He didn't want to be on that stand. I don't blame him. Because he did exactly what anybody would have done; he made the review and he said he talked to the loan officer, Mr. Richardson, and he said...He answered all my questions just as honestly as he could. He said, "Yes, he did this. He made the **[965]** review."

Now, obviously if the loan had been in trouble they wouldn't have turned it over to a junior person in the bank that has got a responsible position, but they would have given it to somebody, I believe, that would have really torn this thing apart if the loan had been in trouble in August of 1978 like Mr. Richardson would not like you to believe.

Everything just ties together, Ladies and Gentlemen. Look at the records; at what they put on the stand. Think back on the testimony. They violated this Act. It is not a criminal trial, though. There is no criminal act on the part of the bank, in my opinion. I believe they violated the civil law, without question. I think they have damaged the Parsons, without question, they have hurt them.

But the issue in this case is, did they violate the Bank Holding Company Act? Now, I want you to just look at these records. Look at them carefully because that is really what the lawsuit is all about.

Dr. Dense, as I was going to tell you, made the statement on that stand that he acutally helped write the manual for the examiners who examine these national banks. He has actually been involved **[966]** in that activity. He actually has great knowledge of the banking industry. They didn't try to destroy Dr. Dense's credibility. In fact, they didn't question anything about it. This man knows his business. He is an expert. He said

he has testified on both sides; he has testified for banks and he has testified for plaintiffs, and he tells it exactly like it is. He didn't try to dodge any questions. The Judge had to fuss at him one time about fencing with Mr. Nachman and, frankly, I wish he hadn't. But the whole truth of the matter is, he said if there was anything wrong with that loan you would find it in the bank records. Do you remember that question asked him? He said it would be in the bank's records if the Parsons had done anything wrong. So, that tells me they didn't consider this much of a problem loan, really. It was well collateralized. Look at what the records said.

Go back to...Mr. Herbert himself passed on that loan back in '77 for a half a million dollars; five hundred thousand dollars. They made Mr. Parsons put up everything you can imagine. Made his wife sign a personal guaranty — of course, she did on the stock — they got a guarantee out of it, also they got one out of Mr. Parsons, also they got the land...**[967]** or a mortgage, which Mr. Herbert skillfully didn't tell you much about during the direct testimony.

You remember what he said? Exactly what he said? I wrote it down. And I hope Mr. Nachman disputes me on this one point because he is going to dispute me on a lot of points. I want him to dispute me on this fact: Mr. Herbert, as I recall his testimony, said, the reason that we had to take hold of this plan of Jim Parsons — where he wanted to give his business away — the reason we accepted it so quickly and didn't even talk to Mr. Orange much — just sort of like he was a stranger to us; we have never heard of this man Orange — and you remember all this. Mr. Herbert said, "The reason we had to do it was because Jim Parsons could throw us off the land if we were to go in there and take this plant."

Now, let me tell you the exact truth on that. On cross-examination he said, "Yes. We did have a mortgage. Yes. We did." I said, "Could you have foreclosed that mortgage just

like you did the personal property?" He kind of ducked his head.

Did you notice on direct examination he was eager to answer questions? Made a magnificent witness. In fact, sometimes he even answered the questions before the lawyer really asked them. In fact, do you **[968]** remember when we were talking about the business of the private meetings? He refused on that because he knew the answer to the question was something else. And he said "I made one mistake." Said, "Yes, I thought I was in that meeting but I really wasn't, even though Mr. Waller saw me and Mr. Kaufman saw me." And Mr. Orange, I believe, also saw him — I am not sure what he testified on that.

But now he is trying to say that "we just had no choice but to take this land...or this property, this plant. Because he still had the land." But he admitted on cross-examination, "Yes. We could have foreclosed"; reluctantly he admitted it. But he said, "They didn't owe us but two hundred thousand dollars. We couldn't get but that part of it." I think that is incorrect and I think the Court will so state that they have a right to foreclose the mortgage, and the only rights that the landowner has is to redeem it at any time later within a certain period of time in this state, if he can get up two hundred thousand dollars plus the cost and everything that the bank has spent as a result of this. That is the law of the state, and if not I will be corrected.

Now, let me ask you this: If Jim Parsons in that little short time could have come up with two **[969]** hundred thousand dollars, that quick from the corporation, why didn't he just pay the notes up to date? They were without question in default. Look at them closely to see when they were in default. You notice they didn't say much about that.

Now, it all just ties right together when you think about it; when you analyze it. And I believe that any argument that Jim Parsons gained out of this is going to be mighty hard to sustain

because, obviously, without question, this was a good business. Everybody has cash flow problems, anybody in the business has it.

I will have the opportunity to respond very briefly to Mr. Nachman's argument to you. I appreciate your attention, and I will reserve the rest of my time for then. Thank you.

Portion of Defendant's Closing Argument

THE COURT: Mr. Nachman?

MR. NACHMAN: May it please the Court, and Ladies and Gentlemen of the Jury. I want to join Jere Beasley in thanking you for your attention here in very difficult circumstances. I know that most of you had to come a long way for a four-day trial, and we appreciate it because you people and the Judge here are the only people that we have to resolve the disputes when they arise between persons or persons and **[970]** and businesses, or however. That is what the American system of justice is about. But I know it is an inconvenience and it has been hard. I am glad we are concluding this case today and I certainly agree with Jere: I am glad it didn't last as long as we predicted it to last.

Now, let's talk about this case. Let's not talk about whether somebody was in an office at a certain time or whether somebody said something, or whether somebody wrote something down. Let's just talk about what this case. And I will return to my earlier statement. This is a garden variety case. It is an unusual case because it comes under a very, very narrowly drawn Federal statute which, as I told you at the outset in my opening argument, prohibits banks from doing certain things of an anti-trust nature; anti-competitive; against free competition. And what it prohibits banks from doing is to say to any customer, we will only . . . let us say . . . I used the example in my opening argument, of an automobile dealer. "We will only

lend you so much money, Mr. Automobile Dealer, if you, Mr. Automobile Dealer, will agree to discount all your notes to our bank." Or, "We will only lend you money to purchase a piece of real estate if you will agree to go through a certain real estate agent."

[971] It is that kind of tying one thing to another that this statute prohibits. This statute hasn't got one thing in the world to do with whether anybody connected with First Alabama Bank or any other bank followed a loan manual or didn't follow a loan manual, or whether anybody connected with the bank wrote something down or didn't write something down — Congress hasn't said that somebody can come into court and sue a bank for that.

There is no such thing as that involved in this case. It is all camouflage. It is all covering up what the facts in this case were which show, first of all, that there never was any loan; that the bank . . . we don't even get past that point, because we think the testimony is overwhelming. It was denied by Jim Parsons, and that is all, and I will get to him later.

But Mr. Ed Herbert was absolutely plain: The last thing the bank did with regard to these loans was to wrap them up in September and consolidate them. And from that point on, it was just a question of when the bank was going to foreclose because the loans, without dispute, there is no dispute in the evidence, the loans were in default and the bank

* * *

[980] events that took place in December. Now, bear in mind the bank could have foreclosed these loans at any time. Bear in mind that the bank was willing to go along with this composition of creditors to defer the time to pay the principal, put it off until some future time; to lower the interest rate to some future time; indeed, to give them five or six or seven months without paying any interest at all. The creditors wouldn't go along with

that. Then we come to the matter of whether the bank had anything to do with forcing Mr. Orange, Mike Orange, into this business.

Now, first of all — to return to the point that I mentioned earlier — unless you find that the bank had committed, had agreed, to make a loan, you don't even need to reach the question of whether the bank insisted on any condition for loaning because the first thing you have got to find is that the bank agreed to make any loan. And we submit that the evidence is overwhelming. You have heard Herbert's testimony. You heard Orange's testimony that there was no agreement whatever to loan them any more money. And use your own good common sense. Would you lend this man any more money? You know perfectly well you wouldn't have lent this business any more money. The **[981]** last thing in the world the bank would have agreed to would have been to lend him any more money. So, that is the end of that part of it.

But, let's suppose, just for the sake of argument, that there had been; you go past that point. Would it have been unreasonable, would it have been improper, for the bank or anybody else, you lending money to a business, to insist, when the business was being run that way and you knew it was, that you wouldn't lend any more money unless there was new management?

Now, Herbert has said as plain as anybody can state: All the the world he did was introduce these people and put them together with one another, and from that point on they worked out their own arrangement. The first thing they did after they determined that Orange didn't want to buy the business was to get together on some sort of stock option agrement. Here again, without dispute, Jim Parsons told Luther Waller that he owned ninety-eight shares out of a hundred shares of this Mobile corporation. It is in the very first paragraph of that option agreement, and Jim Parsons signed it three different times. Same false statement, without dispute...

Portion of Plaintiffs' Final Closing Argument

[991] city, what did he say about the garden variety case? He said in forty-six years he had never heard of a bank requiring a change in management and a change in ownership as a condition to making a loan, or whatever.

The Court will charge you . . . Mr. Nachman badly misstated the law. The Court will state the correct law in this case. I won't try to do it. I believe that he will charge you as to what is involved here; whether it has to be an actual outflow of money or consolidation of debt, a restructuring or whatever, that qualifies under the Bank Holding Company Act. Mr. Nachman threw in a bunch of straw and tried to make you forget the real issues in the case, and I know you are not going to do that. The real issues are simply this: Did the bank violate the Bank Holding Company Act?

And after you take all of the evidence and look at it . . . And don't be misled, now, about this business of not looking at the documents. I want you to look at the documents. Even it it takes you thirty or forty minutes more, look at the documents. I am not ashamed to base our case on the documents, because if there had been anything wrong with the loan, it would be in the records of the bank. Everybody has admitted that. Everybody. And you won't

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Oral Charge of the Court

[1003] . . . You, as jurors, are not obliged to accept the testimony of any witness even though the testimony is uncontradicted and the witness is not impeached. You may decide because of a witness' appearance or his demeanor or because of the inherent improbability of his testimony or for other reasons sufficient to you, arising from the evidence, that such testimony is not worthy of belief. And after making your own judgment,

you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Now, we have talked a good deal about this Bank Holding Company Act, and I want to mention that Act again to you. It reads in pertinent part as it applies to this case, that, "A bank shall not extend credit or fix or vary the consideration for the extension of credit on a condition or a requirement that the customer provide some service to such bank **[1004]** other than those related to and usually provided in connection with a loan service."

Now, that is what Mr. Parsons says the bank did, and he says that the way they did it was in requiring him to transfer management and ownership, and ownership in this company, to Michael Orange or to Michael Orange's company.

Now, what are we talking about in "usual banking practices?" The Act is not intended to interfere with the conduct of apporpriate, traditional banking practices. Now, what is an appropriate, traditional banking practice or usual banking practice must vary a good deal, depending upon the circumstances of the individual case. And these bankers or banking experts have testified before you about what is or might be usual banking practice. You have heard their testimony.

Now, the Act does not prohibit attempts by banks to protect their loan investments or any other investments, as long as they don't go beyond that; what is appropriate and traditional. It does not interfere with usual banking practices.

For instance, if an automobile dealer wanted to borrow some money from a bank and if that bank informed that automobile dealer that it would let him **[1005]** have the loan only on the condition that the automobile dealer would discount a substantial share of his automobile loans to his customers to this same bank, that if he would transfer his customers' obligations to the same bank with some discount, some profit to them, then that

kind of an agreement or an arrangement would be a tying arrangement, prohibited by the Act, and this would be because the bank would be tying its loan or requiring some certain service from their customer that was not in the usual banking practice, or tying its loan, tying a product or service, to another bank service. That is, the acceptance of the automobile installment paper tied to another product or service. Now, this is a kind of practice which the Act prohibits.

On the other hand, the Act does not prohibit traditional, usual, banking practices designed to safeguard loans. And that would include mortgages; taking mortgages under . . . or secured instruments on real estate or personal property, or any sort of security interest in the personal property; the maintenance of certain balances or the requirement that certain balances be maintained in an account; the requirement of guarantees or guarantees by other persons to pay the loan if the borrower defaults; **[1006]** or the foreclosure of mortgages or other liens in order to collect the money.

Now, in the circumstances of this case, the Plaintiffs do not claim that the Act is violated by acceptance of the three notes which were in default and on which the Defendant foreclosed on January of 1979, nor do they claim that the foreclosure on those notes was in any violation of the Act. The Plaintiffs make no contention that the Defendant violated the Bank Holding Company Act in any way in making, accepting, or foreclosing those notes.

Now, the Plaintiffs in this case have brought this action under the Bank Holding Company Act, claiming that the Defendant, the First Alabama Bank, has violated the provisions of that Act.

The Bank Holding Company Act provides in substance and in material part that a bank shall not in any way fix the consideration for extending credit on the condition or requirement that the customer provide some additional service to such bank other than those related to and usually provided in connection

with a loan. And the burden is on the Plaintiffs in this case to reasonably satisfy you from the evidence — and that means the same thing as to prove by a preponderance of the evidence — in the case these — **[1007]** three things: That in connection with the fixing, the consideration of a loan, or extension of credit, the bank required the Parsons to provide some additional service to the bank — that is, the transfer of the ownership of this business — and that the additional service required was other than a service related to and usually provided in connection with a loan.

It is up to you to decide whether or not the bank . . . whether or not the Plaintiffs have proved those three elements by a preponderance of the evidence in this case.

Now, the Plaintiffs are claiming that the additional service required to be provided to the bank was not related to or usually provided in connection with a loan, was as follows: That the Plaintiffs, the bank, made Michael Orange chief executive officer of Parsons Steel of Montgomery and made . . . excuse me. That they required that the Parsons make Michael Orange chief executive officer and president of Parsons Steel of Montgomery, and make Michael Orange the majority stockholder of that corporation. Now, if they didn't do both of those, then the Plaintiffs' case would fail.

Now, if you are reasonably satisfied from the evidence that in connection with an extension **[1008]** credit or a loan, the bank made that requirement of the Plaintiffs, and you are further satisfied that the requirement is not one related to or usually provided in connection with a loan, then your verdict should be for the Plaintiffs.

I further charge you that as it is used in the Bank Holding Company Act, the term "extension of credit" refers to a consolidation and foregoing overdue collection of existing loans or a renewal of an existing debt, as well as the advancing of additional funds.

Now, that is the contentions of the Plaintiffs.

The Defendants have several defenses. Some of them are in the alternative. First of all, they contend that the Plaintiffs have not proved by a preponderance of the evidence that the bank committed itself to extend or promised to extend any credit to Parsons Montgomery at the time in question. They say, "We didn't plan to lend him any more money, or we never told him we were going to lend him any more money, or we didn't propose to lend him any more money." Now, that is one of their contentions. And any one of these is sufficient, if the Plaintiff has failed to negative it, by a preponderance of the evidence. **[1009]** Any one of these is sufficient as a defense to the bank and if the bank establishes any one of them or the Plaintiffs have failed to negative any one of them by preponderance of the evidence, then you should find for the bank.

The first of them is that the bank says it didn't agree to extend any further credit. Second, it says that the Plaintiff has failed to establish by a preponderance of the evidence that a condition of extending credit the bank required Mr. Parsons to give an option to buy a majority of the stock of Parsons Montgomery to Michael Orange. They say that that was not established by a preponderance of the evidence. And they say further, thirdly, that the Plaintiffs have failed to prove that even if . . . prove by a preponderance of the evidence that even if there was a commitment to extend credit conditioned upon a change in ownership of Parsons Steel Montgomery, that in order to find for the Plaintiff you must also find from a preponderance of the evidence that such a requirement was not an unusual, traditional and appropriate banking practice under the facts of this case. And they say that the Plaintiff has failed to prove by a preponderance of the evidence that it was not a usual, traditional and appropriate banking **[1010]** practice under the circumstances surrounding this case.

Now, they further say as a defense that the officer — and these are interrelated to one or more of the defenses, as I understand it. They say that the officer of the bank made it plain by October the 1st, 1978, before any wrongful conduct was alleged to have taken place, that there would be no further extension of credit to Parsons Steel Montgomery or to Mr. Parsons, and that they stuck with that throughout; that they never had any idea of lending further money to Mr. Parsons. That is their contention.

Now, I charge you further that an agreement to make a loan or to extend credit must involve more than an attempt by a borrower to borrow money from a bank; that the Plaintiffs, by a preponderance of the evidence, must prove to your reasonable satisfaction in order to recover that there was something more than conversation about the possiblity of a loan or an extension of credit. They must prove that there was a definite agreement by the bank to lend the money or to extend credit to Parsons Montgomery if certain conditions were met.

Now, if you are not reasonably satisfied by a preponderance of the evidence that the defense at **[1011]** any time after October 1st, 1978 agreed to lend money or extend credit to Parsons Montgomery, then your verdict should be for the bank, the Defendant.

Now, you will take all of these documents and all of this evidence that has been offered to you and you go back to the Jury Room and you will consider these matters and you will decide upon your verdict.

Your verdict will be on the form . . . One or the other of these two forms. You are simply asked at this stage of the proceeding to find either for the Plaintiffs or the Defendant. You are not asked to fix any amount. That is not your concern at this point, and you simply find for the Defendant or for the Plaintiffs, if you can agree upon such a verdict. That verdict must be the verdict of each of you who will consider the case.

Now, I have had several other jurors sit in on this case so that they could participate in it and hear the evidence, and if any of you have had any sort of emergency, those other jurors would have served instead of the ones who will consider the case. But you will . . . Those four alternates will be excused, temporarily at least. You will be excused from the deliberations and you will be held

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